

# A Lawyer Writes

## *A Practical Guide to Legal Analysis*

SECOND EDITION



CHRISTINE COUGHLIN • JOAN MALMUD ROCKLIN • SANDY PATRICK

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*A Practical Guide to Legal Analysis*

Second Edition

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**Joan Malmud Rocklin**

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*To the family I was born to and the family I was blessed with—Rick, Jacob, Jonathan,  
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*To my parents, who were my first editors, and to Bob Rocklin, my co-editor and partner in  
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JMR

*To Shawn, Anna Blake, and MacLean, who teach me new things every day.*

SCP

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## Introduction

Imagine that you are a lawyer in the middle of your first day on the job. You have completed your W-4 forms, taken a tour of the office, and shaken hands with new colleagues. Finally, you walk into your office.

At that moment, the phone rings. A senior partner asks that you come to her office. When you arrive, she explains that the firm has a new client who has been arrested and charged with robbing a local bank. She explains that the client's guilt hinges on a statement he made to an undercover police officer. She wants to know whether the client's statement can be excluded from the trial. She asks that you research the problem and get back to her with your analysis.

Your legal career will get off to a much better start if you know *how* to “get back to her with your analysis.” We have written this book for that reason. This book will teach you how to assess the merits of a legal problem and how to communicate your assessment to other attorneys. Those two skills—the ability to assess a legal problem and to communicate your assessment to others—will form the cornerstone of your work as an attorney.

To develop those skills, it will help to imagine that you are a new attorney working in a law office, perhaps a private law firm or a public agency. Your client faces either civil litigation or a criminal trial. Your job is to assess the strength of your client's legal position—one of the most typical tasks asked of a new attorney.

We know that not all of you plan to be trial attorneys. Some of you may not even plan to practice law after you graduate. This book, however, will be useful no matter what field you choose. As you read this book, you will be developing fundamental skills of analysis and communication.

To learn those skills, you will have to be open to a new way of thinking, organizing, and explaining. Each professional discipline has its own way of analyzing a problem and communicating that analysis. The tools and language that a doctor would use to explore and discuss a problem are different from the tools and language that an engineer would use or that an English professor would use.

Our job is to teach you how an *attorney* would explore and discuss a legal problem. Although you bring with you a great many skills from your previous academic and professional disciplines—most notably a keen intellect—you have never before been an attorney.

In this book, we will take you step-by-step through the process of developing and presenting a legal analysis. To prepare you to analyze your client's legal question, we will describe the sources of law and how to weigh, synthesize, and organize those sources. Then, we will show you how to construct a variety of legal arguments, from the simple to the more sophisticated. Finally, we will discuss how to present your legal analysis, whether in an office memorandum or in a professional e-mail.

And that brings us to the first chapter. That chapter explains how attorneys in an office communicate with each other and what it will look like when you get back to that partner with your legal analysis.

## Chapter 1

# How Attorneys Communicate

[I. What Is an Objective Analysis?](#)

[II. How Do I Present My Analysis?](#)

[A. An Office Memorandum](#)

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[III. How Do I Convince an Attorney My Analysis Is Sound?](#)

[A. Know Your Client and Your Client's Question](#)

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When you are asked to provide a legal analysis to a senior attorney, you will typically provide that analysis in writing, either in an office memorandum or in an e-mail. That analysis must do two things: It must present an objective analysis of the client's legal question *and* convince the senior attorney that the analysis is sound. This chapter explains what an objective analysis is, how to present that analysis in a memorandum or e-mail, and how to convince an attorney that the analysis is sound. Finally, this chapter will explain a bit more about what happens with your legal analysis after you have submitted it to the senior attorney.

## **I. What Is an Objective Analysis?**

When a senior attorney asks you to get back to her with your analysis, the senior attorney is asking for an “objective analysis.” An “objective analysis” is a neutral assessment of a client’s legal problem. An objective analysis overtly discusses both the strengths and weaknesses of a client’s legal position and predicts the most likely outcome. For that reason, “objective writing” is also referred to as “predictive writing.”

Objective writing is distinct from “persuasive writing.” When an attorney writes persuasively, the attorney urges the reader to focus on those arguments that support the client’s preferred outcome and minimizes any weaknesses in those arguments. In both objective and persuasive writing, the attorney accurately presents the law, applies the law to the client’s case, and makes a recommendation about how to proceed. The difference between the two is in how explicitly the writer explores weaknesses. In objective writing, an attorney specifically and thoroughly explores and evaluates weaknesses.



## II. How Do I Present My Analysis?

An objective analysis can be presented to a colleague in either an office memorandum or an e-mail. Of those two methods, an office memorandum is more appropriate if your legal analysis will fill more than one computer screen. Since most of your legal analyses will fill more than one computer screen, this book will look first at how to develop an office memorandum. Later, this book will look at presenting a legal analysis in an e-mail. Once you know how to present your legal analysis in an office memorandum, it is fairly easy to scale back and present a shorter analysis in an e-mail.

### A. An Office Memorandum

You can see how you might present an analysis in an office memorandum in [Example 1-A](#). In that memorandum, an attorney answers the question posed in the Introduction: Will a client's statement be admissible at trial? As you read the memorandum, look first at the substance of the memorandum; then look at the form in which it is communicated.

#### 1. The substance of a memorandum

With respect to the substance, the attorney will explain the law and then apply the law to the facts of the client's case. Those two components—an explanation of the law and then an application of the law to the client's facts—are the core components of a legal argument.

Look also at the conclusion the attorney reaches. The attorney explains that the client's statement will be admissible. Since the statement, if admitted at trial, will likely send the client to jail, the attorney is predicting an unwelcome outcome. He explains other alternatives, but ultimately he has to acknowledge that a bad outcome is likely.

Honestly assessing and clearly stating the real likelihood of success is critical to providing sound legal advice; an honest assessment is the purpose of writing an objective legal analysis. Your research and analysis will not always lead you to a result that is bad for your client, but when it does, you must acknowledge the bad news and consider alternative strategies. Doing so allows you, your colleagues, and your client the opportunity to realistically assess the available strategies *before* investing thousands (and sometimes millions) of dollars on a business decision or litigation.

#### 2. The form of a memorandum

After reading the substance of the memo, consider its form. Although every law office has its own style, a memo typically has five parts: (1) an introductory statement that briefly lays out the questions the memo addresses, (2) concise answers to those questions, (3) a statement of facts, (4) a discussion that analyzes those questions, and (5) a conclusion. You can see each of these parts in [Example 1-A](#).

#### Example 1-A • Memorandum

#### MEMORANDUM

**TO:** Rita Zal  
**FROM:** Theo Thomas  
**DATE:** September 9, 2013  
**RE:** Paul Adams – Admissibility of evidence

#### QUESTION PRESENTED

The **Question Presented** describes the legal questions the memo will address. (Ch. 13)

Under Oregon law, which allows a defendant's statement into evidence if the statement was made during "mere conversation" with an officer, will Mr. Adams's statement be admissible when it was made after the undercover officer parked an unmarked police car behind Mr. Adams's car and Mr. Adams told the officer he was not yet planning to leave?

#### BRIEF ANSWER

The **Brief Answer** tells the senior attorney the author's bottom line. (Ch. 13)

Yes. The statement will be admissible against Mr. Adams. Evidence is admissible against a defendant if it is gathered during "mere conversation" rather than during a stop. An officer stops another individual only if that individual could reasonably believe that his liberty was

being restrained. Mr. Adams could not reasonably believe that his liberty was being restrained. Therefore, Mr. Adams's statement likely will be admissible.

## STATEMENT OF FACTS

The **Statement of Facts** tells the client's story; however, the story is limited to the facts that will be relevant to the author's legal analysis. (Ch. 14)

On August 15, 2008, police officer Ephgrave spoke with Paul Adams, a suspect in a local bank robbery. During that conversation, Paul Adams revealed information that implicated him in the bank robbery.

Earlier that day, Officer Ephgrave saw a white Ford Probe pull into a parking lot. The car looked similar to the car involved in the Davinsk Mutual Bank robbery, and Officer Ephgrave decided to investigate. At the time, Officer Ephgrave was working undercover and was wearing ordinary street clothes and driving an unmarked car.

Officer Ephgrave pulled into the parking lot and parked behind the Ford Probe. As he got out of the car, Mr. Adams yelled at the officer to move his car. Officer Ephgrave walked over to the bench where Mr. Adams was sitting and asked if he was planning to leave. According to the officer, Mr. Adams said, "No, I'm going to sit a little longer." Officer Ephgrave pointed out that there was nowhere else to park because all the other spaces were full and told Mr. Adams he would move his car before Mr. Adams had to leave. According to Officer Ephgrave, Mr. Adams said, "Oh, okay. No problem."

Officer Ephgrave and Mr. Adams began chatting. Officer Ephgrave steered the conversation to the recent bank robbery. As they spoke, Officer Ephgrave remarked that the bank teller had said that the robber was very polite. Mr. Adams added, "Yeah, I heard he even gave a strawberry lollipop to a kid in the bank." Officer Ephgrave knew that the media had reported that the bank robber had given a child a lollipop, but not its flavor. Officer Ephgrave then arrested Paul Adams.

Mr. Adams was arraigned on August 20, 2008. He pleaded not guilty to the charges. He is now awaiting trial.

## DISCUSSION

The **Discussion** of the client's legal question begins with an introductory **roadmap section**. The roadmap section provides background necessary to understand the legal analysis that follows. (Ch. 12)

Paul Adams's statement about the flavor of the lollipop will be admissible because the statement was "mere conversation" and not made during a stop. Under Oregon law, citizens can have different kinds of encounters with police officers. *State v. Warner*, 585 P.2d 681, 689 (Or. 1991). If the encounter is "mere conversation," evidence acquired during the encounter is admissible against the defendant. *State v. Shelton*, 796 P.2d 390, 392 (Or. Ct. App. 1990); *State v. Spenst*, 662 P.2d 5, 6 (Or. Ct. App. 1983). By contrast, if the encounter is a "stop," then evidence is admissible against the defendant only if the stop is justified by reasonable suspicion. *Spenst*, 662 P.2d at 6.

The discussion focuses on one legal argument: whether Mr. Adams was stopped. The legal argument begins with a **Conclusion**. (Ch. 9)

After stating the conclusion, the attorney **explains the law**. (Ch. 7). (The explanation of the law begins with "A 'stop' occurs if....")

Mr. Adams's statement was mere conversation rather than a stop because Mr. Adams could not reasonably believe his liberty was restrained during his encounter with Officer Ephgrave. A "stop" occurs if a person's liberty is restrained, by physical force or a show of authority, by a peace officer lawfully present in any place. Or. Rev. Stat. §131.605(6)(2007); *State v. Warner*, 901 P.2d 940, 942 (Or. Ct. App. 1995). A person's liberty may be restrained if an individual believes that his liberty has been restrained and that belief is objectively reasonable. *Warner*, 901 P.2d at 942. To determine whether a person reasonably believes his liberty has been restrained, a court will consider the totality of the circumstances. *State v. Wenger*, 922 P.2d 1248, 1251 (Or. Ct. App. 1996). If, under the totality of the circumstances, a person could not reasonably believe his liberty was restrained, the encounter is "mere conversation." *See, e.g., State v. Smith*, 698 P.2d 973, 975 (Or. Ct. App. 1985).

Notice that the explanation of the law does not mention the client. Omitting the client gives your reader an opportunity to absorb the relevant law before she has to understand how the law will apply to the client's case.

A police officer may request information without restraining a person's liberty. *State v. Gilmore*, 860 P.2d 882, 883 (Or. Ct. App. 1993). In *Gilmore*, an officer requested identification from three people who were sitting in a truck. *Id.* When the defendant opened the glove

compartment to retrieve his identification, the officer saw a gun and arrested the defendant for illegal possession of a firearm. *Id.* Although the defendant argued he had been illegally stopped and, therefore, evidence of the gun should be excluded from trial, the trial court admitted the gun into evidence. *Id.* In upholding the trial court's decision, the Court of Appeals explained that, even if the defendant felt he was not free to leave, that belief was not objectively reasonable. *Id.* The Court of Appeals explained that, although the officer requested identification, the officer did not require the defendant to alter his course, nor did the officer prevent the defendant from leaving. *Id.*

By contrast, a person may reasonably believe his liberty has been restrained if a police officer blocks that person's car. *Wenger*, 922 P.2d at 1251-52. In *Wenger*, the defendant was intending to leave a parking lot when uniformed officers parked their patrol car and blocked in the defendant's car. *Id.* After noting that a stop occurs when an officer prevents a vehicle from being driven away, the court held that the defendant reasonably believed his liberty had been restrained. *Id.* at 1251-52.

The explanation of the law ends here.

After explaining the law, the attorney **applies the law** to the client's case. (Ch. 8)

The application does not include any new law. The attorney relies on law that has been explained above in the explanation of the law.

In this case, Mr. Adams's encounter with Officer Ephgrave was mere conversation rather than a stop because he could not reasonably believe his liberty was being restrained. Mr. Adams's encounter is similar to the encounter in *Gilmore*. In both cases, an officer approached the defendant seeking information. In *Gilmore*, the officer asked for identification, and in Mr. Adams's case, the officer wanted to learn whether the defendant was involved in the bank robbery.

However, seeking information is not enough to convert their conversation to a stop. In Mr. Adams's case, as in the *Gilmore* case, the officer did not alter the defendant's course or prevent him from leaving. Officer Ephgrave asked Mr. Adams whether he was planning to leave. Mr. Adams said he was not. In addition, Officer Ephgrave said that he would move his car before Mr. Adams had to leave. According to Officer Ephgrave, Mr. Adams agreed, saying "Oh, okay. No problem." Therefore, Officer Ephgrave did not prevent Mr. Adams from leaving nor did the officer alter Mr. Adams's course. Thus, a court should follow the reasoning in *Gilmore* and conclude that Mr. Adams could not reasonably believe his liberty was restrained.

In fact, a court is likely to conclude that Mr. Adams's encounter with the officer was even less restrictive than the encounter in *Gilmore*. In addition to not altering Mr. Adams's course and not preventing him from leaving, Officer Ephgrave was not in uniform. Because Mr. Adams believed he was talking to a civilian, Mr. Adams should have felt even more free to leave than did the defendant in *Gilmore*, who knew he was talking to a uniformed officer. Thus, a court is likely to hold that Mr. Adams's encounter with the officer was mere conversation and that the evidence is admissible.

Even though Officer Ephgrave's car did block Mr. Adams's car, a court is likely to distinguish Mr. Adams's case from the *Wenger* case. In the *Wenger* case, the court noted that the defendant was intending to leave at the time his car was blocked. By contrast, Mr. Adams told Officer Ephgrave that he was "going to sit a little while longer," suggesting that he was not intending to leave. Because he was not intending to leave, a court is less likely to conclude that Mr. Adams reasonably felt his liberty was restrained. Accordingly, a court will likely determine that Mr. Adams was not stopped and that his statement about the lollipop is admissible.

The application of the law to the client's case ends with a **Conclusion**. (Ch. 9)

## CONCLUSION

In the **Conclusion to the Memorandum**, the attorney includes practical suggestions about the next steps to be taken. (Ch. 15)

Because the evidence against Mr. Adams is likely to be admissible, we should discuss with Mr. Adams the risks associated with going to trial, the costs and benefits of pleading guilty, and plea bargains he might be willing to make.

## B. An E-mail

Although longer analyses should be presented in an office memorandum, shorter analyses can be quickly conveyed in an e-mail. [Example 1-B](#) shows a typical inter-office e-mail. In substance and in form, e-mails are similar to office memoranda.

### **Example 1-B • E-mail**

**From:** Gail Mosse [[gmosse@zalassociates.com](mailto:gmosse@zalassociates.com)]  
**Sent:** Friday, September 8, 2013  
**To:** Dina Wong [[dwong@zalassociates.com](mailto:dwong@zalassociates.com)]  
**Subject:** Oursine Living Will

Dina –

You asked whether Tom and Kitty Oursine’s living will would be enforceable in Oregon. The answer is that it will not be enforceable.

The Oursines drafted their living will on their computer and signed it themselves without any witnesses. Under Oregon Revised Statutes §127.531, living wills “must be the same as the form set forth in this section to be valid.” That section also requires that two witnesses sign the form. *Id.*

As a result, the Oursines will need to re-draft their living will. The Oursines can access the correct form at [http://egov.oregon.gov/DCBS/SHIBAadvanced\\_directives.shtml](http://egov.oregon.gov/DCBS/SHIBAadvanced_directives.shtml).

Please let me know if you have any further questions.

Gail

#### **1. The substance of an e-mail**

In an inter-office e-mail, as in a memorandum, attorneys seek to give an honest assessment of their legal analysis and provide practical solutions for their clients. In [Example 1-B](#), the attorney explains that Oregon courts will not enforce a living will as the clients have currently written it, but the attorney also explains how to create an enforceable living will.

#### **2. The form of an e-mail**

An e-mail will often have the same five parts that are in an office memorandum. If you look closely at the e-mail in [Example 1-B](#), you will see that the first paragraph states (1) the question the e-mail addresses and (2) the answer to that question. The second paragraph (3) states the facts and (4) analyzes the question. The last paragraph (5) concludes and offers practical advice.

### **III. How Do I Convince an Attorney My Analysis Is Sound?**

Whether your analysis is in an office memorandum or an e-mail, you will have to convince another attorney that your analysis is sound. Convincing an attorney that your analysis is sound takes work. Attorneys are skeptical readers. They question. They test each statement as they read. The steps below describe the process you will follow to create that sound analysis.

#### **A. Know Your Client and Your Client's Question**

Your work begins with your client. Law offices maintain files about each client and the legal matters the clients have brought to the office. Even though the senior attorney may have provided you with background about the client, ask for the client's file. Review it and all the documents in it. Clients' legal questions typically turn on the facts, so you must have a comprehensive understanding of the facts before you begin researching.

Make sure you understand the question that your client needs answered. Likely, when the senior attorney described the legal question, it seemed clear enough. Sometimes, though, as you learn more about your client, you realize that you actually have questions about the question being asked. Don't waste time researching if you are unclear about the question. Go back to the senior attorney and ask.

#### **B. Research Thoroughly**

Once familiar with your client's facts and clear about the legal question, you are ready to research. Researching is itself an analytical process that goes beyond merely gathering different legal authorities. You must make choices. You will have to read each authority critically, weed out the irrelevant, and from amongst the relevant, consider *how* relevant each will be. As you research and read, you'll begin developing theories about your client's legal question.

#### **C. Organize**

When you are done researching, you will likely have a stack of legal documents and a variety of books piled up around you. From those stacks, you will have to coax a clear explanation of how the law will respond to your client's problem.

Creating a clear explanation from a variety of legal authorities is no easy feat. A clear explanation of the law requires you to see the legal principles each authority represents. Therefore, you will have to re-organize those stacks around the legal principles relevant to your client's question. You can create a chart and draft an outline to understand the major legal principles, supporting authorities, and how the pieces of the law fit together. In whatever form, re-organizing the authorities around legal points will allow you to see themes in the law, and you will develop a more nuanced understanding for how the law might affect your client.

#### **D. Draft and Revise**

Next, you will begin writing. Writing involves numerous drafts and re-drafts. As you write, you should re-read the authorities to ensure that your analysis is consistent with the law. At this point, you should still be open to revising everything about your analysis and its organization. Ultimately, after re-writing and re-thinking, you will settle on an analysis and an organization that work.

#### **Sidebar**

Although previously you may have been a one-draft wonder when writing papers, legal writing requires more. Attorneys who communicate their analysis most clearly and precisely typically spend more than half their time re-drafting, revising, and editing.

#### **E. Edit and Polish**

After drafting and revising, the editing and polishing begin. You must take a step back from your work and see it as your reader will. As an attorney, you will be dealing with complex ideas. Your job as a writer is to make those complex ideas easy to understand.

When you edit, you will not simply proofread for typos. Rather, you will check that the content is complete and logically ordered. Then, you will tweak transitions and topic sentences so that your discussion flows well. Finally, you will polish, looking for any words that might cause confusion and hunting for any errors in punctuation, grammar, citation, and format.

At the end, you will have a clearly organized, analytically correct, polished discussion of your client’s legal problem. [Table 1-C](#) charts the five basic stages a lawyer goes through to answer a legal question.

**Table 1-C • The legal thinking process**

Stage of the Process	Steps of the Stage
<b>I. Understand your client’s problem and the question being asked</b>	<ol style="list-style-type: none"> <li>1. Understand your client’s factual situation.</li> <li>2. Determine the legal question(s) being asked.</li> </ol>
<b>II. Research the law</b>	<ol style="list-style-type: none"> <li>1. Research <ul style="list-style-type: none"> <li>• to find the governing rule.</li> <li>• to find legal authorities that interpret the governing rule.</li> </ul> </li> <li>2. Critically read the relevant authorities.</li> </ol>
<b>III. Organize</b>	<p>Organize to understand the relationship among the relevant authorities:</p> <ol style="list-style-type: none"> <li>1. Use a case chart or other method <ul style="list-style-type: none"> <li>• to reconcile cases.</li> <li>• to identify the best cases to illustrate the governing rule.</li> </ul> </li> <li>2. Outline the legal principles at issue and the legal authorities that will guide your analysis of the client’s legal question.</li> </ol>
<b>IV. Draft and revise your memorandum</b>	<ol style="list-style-type: none"> <li>1. After understanding the law and determining the governing rule(s), draft.</li> <li>2. Review the relevant authorities to ensure your analysis is consistent with the law.</li> <li>3. Revise the memo to make sure it is organized well (around legal principles).</li> </ol>
<b>V. Edit and polish</b>	<ol style="list-style-type: none"> <li>1. Edit the substance of the draft to ensure your argument is complete and logically ordered.</li> <li>2. Polish to weed out words that might confuse and to eliminate errors in grammar, punctuation, and citation.</li> <li>3. Reread one last time carefully before submitting to your senior partner.</li> </ol>

## F. Think Recursively

Although we have laid out five neat and distinct stages of legal writing, you will likely revisit stages as you work through your project. At each stage, you learn more about the law and how it applies to your client’s problem. Knowing more, you may want to return to an earlier stage and re-think a decision based on the knowledge you’ve gained.

For example, once you begin researching, you may realize that you don’t know a key fact. You’ll have to go back, investigate that fact, and then return to your research. Similarly, as you begin to write, you may identify a gap in your legal analysis. You’ll have to go back and conduct additional legal research to fill that gap.

Especially as you write, stay open-minded to changing earlier decisions. Writing clarifies thoughts. As you write, you will better understand the law and how it will affect your client. You may see better ways to organize your discussion; you may see that a case originally put to the side is more important than you thought. You may even change your conclusion.

In fact, “legal writing” is almost a misnomer. Legal writing is really about committing to paper something much more complex—legal thinking. That legal thinking is the end result of a recursive process that repeatedly looks back on itself and asks whether previous decisions still stand. Expert legal writers allow themselves the time to re-think and revise so that their readers see—not the thinking process—but a complex analysis, clearly explained.

#### **IV. What Happens Next?**

After you submit a legal memorandum or send an e-mail to a senior attorney, the attorney may use it in a variety of ways. The attorney might pick up the phone and call the client to advise the client of your analysis. The analysis might be revised and sent to the client. Alternatively, your analysis might be incorporated into a brief that will be submitted to a court. Depending on the law office, your memorandum or e-mail might also be logged into a document retrieval system so that other attorneys who are working on similar legal questions can build from the legal research that you have already conducted. In that case, your analysis becomes a permanent part of the office's legal database.

In all cases, your goal is to provide your supervisor with a thorough legal analysis so she can provide sound legal advice to your client. The rest of this book will take you step-by-step through the process of developing and communicating that objective legal analysis.

#### **Practice Points**



- The most basic type of legal analysis, an “objective analysis,” allows an attorney to neutrally evaluate the strengths and weaknesses of any legal claim.
- An objective analysis is most typically communicated in one of two ways: a legal memorandum or an e-mail.
- Good attorneys know that revising, editing, and polishing can take as much time, if not more time than, drafting the initial document.

## Chapter 2

# Sources and Systems of the Law

### I. Sources of the Law

#### A. The Legislature

#### B. The Executive Branch

#### C. The Judiciary

### II. Weave a Tapestry of Law

### III. Systems of the Law

#### A. Jurisdiction

#### B. Hierarchical Court Systems

#### C. Stare Decisis

#### D. The Effect of These Three Principles

The last chapter showed you the path ahead. Now, we must go back and look more closely at the steps you will take to develop that analysis.

After learning about your client and the problem that brought your client to your office, you will begin to research. To answer your client's legal question, you will need to know the universe of law that might govern and choose from that universe. To choose well, you will need to determine which law is relevant and assess the impact it is likely to have on your client's case. That is, you will need to evaluate the "weight" of each legal authority. As you select relevant authority and assess the weight of each, you will begin to develop an answer to your client's question.

This chapter is about how to select and weigh legal authority. It will introduce the most common sources of law in our legal system and explain some basic principles that will guide you in determining the use and relative importance of those legal authorities.



## I. Sources of the Law

A law is any binding custom or practice of a community. In the United States, each branch of government has authority to create and publish law: The legislative branch enacts statutes; the executive branch issues regulations and executive orders; and the judicial branch produces case law.

Law from any branch of government is primary authority. The word “primary” refers to authority that the government creates and publishes. In other words, primary authority *is* the law. “Secondary” authority is commentary about the law and is not binding on anyone. Secondary authority can provide you with an overview of an area of law or a critique of the law. Examples of secondary authority are legal encyclopedias, law review articles, and treatises.

Secondary authority is helpful when you are researching an unfamiliar area of the law and need to quickly understand its broad contours. Primary authority, however, has more weight because it is the law. Thus, in your memorandum to the senior partner, you will typically rely on primary authorities.

The Federal Constitution, which is primary authority, is the highest law of the land. It establishes the three branches of the federal government, each of which creates law. Each state also has its own state constitution, which likewise establishes the branches of state government.

### Sidebar

Attorneys use the words “sources” and “authorities” and the phrase “support for an argument” interchangeably. Each is a catch-all reference to the materials used to analyze and predict the outcome of a legal issue.

## A. The Legislature

Legislatures create two types of authority frequently relevant to analyzing a client’s legal question: statutes and legislative history.

### 1. Statutes

A statute is simply a law enacted by a legislature. Under the Federal Constitution, Congress has sole authority to enact statutes for the nation. Similarly, the legislature of each state is responsible for enacting statutes that regulate conduct in that state.

Typically, statutory sections are grouped into a statutory scheme. For instance, Washington State prohibits bribery in baseball through a series of statutory sections ([Example 2-A](#)). Similarly, the Federal Clean Air Act is a statutory scheme composed of more than 150 sections ([Example 2-B](#)). Together, those sections seek to reduce air pollution in the United States.

#### Example 2-A • A series of statutory sections creates a statutory scheme

##### **67.04.010. Penalty for bribery in relation to baseball game**

Any person who shall bribe or offer to bribe, any baseball player with intent to influence his play, action or conduct in any baseball game, or any person who shall bribe or offer to bribe any umpire of a baseball game, with intent to influence him to make a wrong decision or to bias his opinion or judgment in relation to any baseball game or any play occurring therein, or any person who shall bribe or offer to bribe any manager, or other official of a baseball club, league or association, by whatsoever name called, conducting said game of baseball to throw or lose a game of baseball, shall be guilty of a gross misdemeanor.

##### **67.04.020. Penalty for acceptance of bribe**

Any baseball player who shall accept or agree to accept, a bribe offered for the purpose of wrongfully influencing his play, action or conduct in any baseball game, or any umpire of a baseball game who shall accept or agree to accept a bribe offered for the purpose of influencing him to make a wrong decision, or biasing his opinions, rulings or judgment with regard to any play, or any manager of a baseball club, or club or league official, who shall accept, or agree to accept, any bribe offered for the purpose of inducing him to lose or cause to be lost any baseball game, as set forth in RCW 67.04.010, shall be guilty of a gross misdemeanor.

#### **67.04.030. Elements of offense outlined**

To complete the offenses mention in RCW 67.04.010 and 67.04.020, it shall not be necessary that the baseball player, manager, umpire or official, shall, at the time, have been actually employed, selected or appointed to perform their respective duties; it shall be sufficient if the bribe be offered, accepted or agreed to....

#### **Example 2-B • Statutory sections from the Federal Clean Air Act**

##### **§ 7401. Congressional findings and declaration of purpose**

###### **(a) Findings**

The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation....

##### **§ 7407. Air quality control regions**

###### **(a) Responsibility of each State for air quality; submission of implementation plan**

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State....

##### **§ 7408. Air quality criteria and control techniques**

###### **(a) Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants**

(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria under this section....

## **2. Legislative history**

Legislative history is the record that develops as an idea makes its way through the legislative process and becomes a statute. Attorneys use legislative history to determine the intended purpose of a statute when the language of the statute is unclear.

When a legislator has an idea for a new law, the legislator drafts what is called a bill. The legislator then introduces the bill to the legislature. Typically, the bill will be considered by a committee in each house<sup>1</sup> and, if each committee approves the bill, the bill will be considered by the full legislative body of each house. Along the way, the bill is debated and amended. If the bill is approved by both houses and signed into law by the President (in the case of a federal bill) or by a governor (in the case of a state bill), the bill becomes a statute.

If the language of the statute is unclear and a court is asked to interpret the meaning of the statute, the court may look to the debate that surrounded the statute's enactment and the history of amendments to the statute to interpret the statute's meaning. Because legislatures enact so many statutes, not every statute is subject to formalized, recorded debates.

As an attorney, if your client's legal question involves an ambiguous statute, you will have to determine the extent to which a legislative history exists and assess how that history would

affect a court's interpretation of the statute. [Example 2-C](#) shows an excerpt of the legislative history to the Federal Clean Air Act.

**Example 2-C • Clean Air Act legislative history**

**CLEAN AIR ACT**

**Senate Report No. 638, Nov. 7 1963 [To accompany S. 432]**

**House Report No. 508, July 9, 1963 [To accompany H.R. 6518]**

**Conference Report No. 1003, Dec. 5, 1963 [To accompany H.R. 6518]**

**The House bill was passed in lieu of the Senate bill. The House Report and the Conference Report are set out.**

**House Report No. 508**

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H.R. 6518) to improve, strengthen, and accelerate programs for the prevention and abatement of air pollution, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

**HISTORY OF LEGISLATION**

Air pollution is a serious national problem. It is probable that it will increase greatly, unless appropriate action is taken, owing to further industrial growth and the concentration of population in urban areas. The Nation's rapid progress in technological development has made possible a high level of material benefits for the people, but has also generated, as byproducts of such development, a high level of existing and potential problems of contamination of our environment....

**B. The Executive Branch**

The executive branch also creates law. For example, agencies within the executive branch can create regulations, and the President can issue executive orders.

**1. Regulations**

Although Congress has sole authority to enact statutes, once it has enacted a statute it often delegates to the executive branch the responsibility for creating regulations that will implement the statute. For example, although Congress passed the Clean Air Act, it delegated to the Environmental Protection Agency, an agency within the executive branch, the responsibility for promulgating regulations to implement the Act ([Example 2-D](#)).

If the legal question you are researching involves a statute, you will need to determine if that statute also has accompanying regulations. Some statutes do. Some do not. If the statute is implemented through regulations, you will have to research those regulations to determine how the statute will be applied to your client's case.

**Example 2-D • Excerpt from the Code of Federal Regulations showing regulations implementing the Federal Clean Air Act**

**§ 50.2 Scope.**

(a) National primary and secondary ambient air quality standards under section 109 of the [Clean Air] Act are set forth in this part.

(b) National primary ambient air quality standards define levels of air quality which the Administrator judges are necessary, with an adequate margin of safety, to protect the public health. National secondary ambient air quality standards define levels of air quality which the Administrator judges necessary to protect the public welfare from any known or anticipated adverse effects of a pollutant....

**§ 50.4 National primary ambient air quality standards for sulfur oxides (sulfur dioxide).**

(a) The level of the annual standard is 0.030 parts per million (ppm), not to be exceeded in a calendar year....

(b) The level of the 24-hour standard is 0.14 parts per million (ppm), not to be exceeded more than once per calendar year....

**§ 51.40 In what form should my state report the data to EPA?**

You must report your emissions inventory data to us in electronic form. We support specific electronic data reporting formats and you are required to report your data in a format consistent with these. Because electronic reporting technology continually changes, contact the Emission Factor and Inventory Group (EFIG) for the latest specific formats. You can find information on the current formats at the following Internet address: <http://www.epa.gov/ttn/chief>. You may also call our Info CHIEF help desk at (919)541-1000 or e-mail to [info.chief@epa.gov](mailto:info.chief@epa.gov).

#### **§ 51.45 Where should my State report the data?**

- (a) Your state submits or reports data by providing it directly to EPA.
- (b) The latest information on data reporting procedures is available at the following Internet address: <http://www.epa.gov/ttn/chief>.

## **2. Executive orders**

In addition to regulations, the executive branch can issue executive orders. Executive orders are policy directives that implement or interpret a statute, a constitutional provision, or a treaty.<sup>2</sup> For example, President Kennedy used an executive order to eliminate racial discrimination in federally funded housing,<sup>3</sup> and President George W. Bush used an executive order to permit the federal government to freeze the assets of any person or entity providing financing to a terrorist organization ([Example 2-E](#)).<sup>4</sup> Although executive orders can govern a legal question, executive orders play a less active role in governing peoples' day-to-day lives and are, therefore, less likely to be relevant to your legal analyses.

### **Example 2-E • Executive Order 13224 of September 23, 2001**

#### **Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism**

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*) ... and in view of United Nations Security Council Resolution (UNSCR) 1214 of December 8, 1998, ... and the multilateral sanctions contained therein, and UNSCR 1363 of July 30, 2001, establishing a mechanism to monitor the implementation of UNSCR 1333,

I, GEORGE W. BUSH, President of the United States of America, find that grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the terrorist attacks in New York, Pennsylvania, and the Pentagon committed on September 11, 2001 ... I also find that because of pervasiveness and expansiveness of the financial foundation of foreign terrorists, financial sanctions may be appropriate for those foreign persons that support or otherwise associate with these foreign terrorists....

I hereby order:

**Section 1**.... [A]ll property and interests in property of the following of the following persons that are in the United States or that hereafter come within the United States, or that hereafter come within the possession or control of United States persons are blocked:

- (a) foreign persons listed in the Annex to this order;
- (b) foreign persons determined by the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of ... the United States.

## **C. The Judiciary**

Finally, courts also create law. When a judge issues an opinion, that opinion becomes a part of the law. A judicial opinion can add to the body of law in several ways.<sup>5</sup>

First, a judicial opinion can announce a new principle of law. When a body of law is wholly developed by judicial decisions, that body of law is called "common law." For example, without any enacted statute, courts have allowed individuals to recover for emotional distress after witnessing injuries to close family members; courts have imposed duties on psychiatrists to warn people about dangerous patients; and courts have created defenses such as "entrapment," which allows a defendant to argue that he would not have committed a crime but for a police officer's encouragement. In each of these situations the courts and not the legislature created rights and duties; thus, these situations are examples of the common law.

### **Sidebar**

Attorneys sometimes confuse “common law” with “case law.” “Case law” includes *any* judicial decision. “Common law” is a subset of case law and refers to only those areas of case law that developed in the absence of a statute.

Second, a judicial opinion can create law by interpreting a constitution, statute, or regulation. If the language of any of these authorities can be understood in more than one way, a court can clarify how the language should be understood. To do this, a court would consider the language in question and how that language fits within the rest of the constitutional, statutory, or regulatory scheme. The court would then announce how the particular language should be understood.

Finally, a judicial opinion can create law by applying the law to a new set of facts. Each time a court considers how the law applies to a particular set of facts, it creates a precedent to be followed in future, factually similar cases. Thus, even when the court is not announcing a new principle of law or clarifying the language of a law, the court adds to the body of law by providing examples of how the law applies to individual cases.

## II. Weave a Tapestry of Law

The many sources of the law will create challenges for you as you research and analyze your client's legal question. You will likely never find a single document with a neatly typed, clearly explained summary of the law relevant to your client's question. Rather, you will have to find all the possibly relevant sources, then *choose* the actually relevant sources, and finally *create* that neatly typed, clearly explained summary of the relevant law.

Creating that summary of the relevant law will require you to synthesize a variety of authorities into a seamless explanation of the law that governs your client's case. If you do your job well, your synthesized explanation of the law will look like a beautiful tapestry that clearly displays the intricate patterns of the law. If you do your job poorly, you'll have a fist full of loose threads, but no cohesive, well-woven explanation of the law.

For example, the memorandum in the previous chapter, [Example 1-A](#), addresses whether a client's statement will be admissible at trial. To write that legal analysis, the attorney had to research all the relevant law and then choose those authorities that were *most* relevant to answering the client's legal question. Ultimately, the discussion focuses on a statute that defines a "stop" and case law that interprets the statute. The explanation of the statute and case law is the synthesized explanation of the law.

To weave that synthesized explanation of the law, attorneys rely on a few fundamental principles of legal analysis. Those principles help an attorney sort through the various materials and carefully select the most appropriate materials for the job. Using those principles, you will also be able to weave together a cohesive, clear explanation of the law.

### III. Systems of the Law

Three fundamental principles of our legal system will help you choose the materials that will be most relevant to answering your client's legal question. Those principles are jurisdiction, the hierarchical structure of courts, and stare decisis.

#### A. Jurisdiction

When selecting material for a legal analysis, jurisdiction is the first cut that separates the relevant from the less relevant. "Jurisdiction" is an area of authority over which a governing body has control.<sup>6</sup> Because a court or enforcement agency is required to follow only the laws of its jurisdiction, your research and analysis should begin with the law of the governing jurisdiction.

Although our legal system depends on many different jurisdictions,<sup>7</sup> for our purposes, the most important kind of jurisdiction is jurisdiction based on the geographical reach of a legislature or court.

With respect to the geographical jurisdiction of courts and legislatures, citizens of this nation are typically governed by two sovereigns.<sup>8</sup> The United States federal government is one sovereign jurisdiction. Its legislature, the United States Congress, has authority to enact laws that affect all the people and businesses within the United States. Its court system has the authority to interpret and apply the laws Congress has created.

Within the United States, more than fifty other jurisdictions exist.<sup>9</sup> Each state is its own sovereign jurisdiction with its own legislature and its own court system. Each state's legislature has authority to enact laws for that state, and courts within that state have authority to impose those laws on those people and businesses within their jurisdiction.

When you begin researching a legal question, you must first determine the jurisdiction that will govern your client's legal question. Sometimes determining the jurisdiction is easy. For example, the jurisdiction is relatively easy to determine when all parties reside in the same state and the dispute arose in that state. In that case, jurisdiction will usually be determined by whether the client's legal question is governed by state or federal law. Sometimes, however, the jurisdiction is more difficult to determine such as when the parties live in different states or the dispute crosses state lines. In those cases, determining the jurisdiction may create an entirely new question that needs to be researched. Once you have determined the governing jurisdiction, you will focus your research and analysis on that jurisdiction.

#### Sidebar

**Mandatory authority** is *always* primary authority. To be mandatory, the authority must emanate from a government body.

**Persuasive authority** can be primary or secondary authority.

For example, a court opinion from another jurisdiction is persuasive, primary authority. It is not binding outside of its own jurisdiction, but it emanates from a government body.

A law professor's law review article is persuasive, secondary authority because it is not binding and the professor is not a government body.

Law from within the governing jurisdiction is called mandatory authority. Mandatory authority is binding on the parties and their dispute. Because it is binding, mandatory authority is given the most weight in a legal analysis.

Law from other jurisdictions is persuasive authority. A court deciding a legal issue may consider authority from another jurisdiction. Although a court is not required to rely on or follow case law from another jurisdiction, a court may do so if it finds the reasoning expressed in that case law to be persuasive and consistent with the law from the court's jurisdiction.

In analyzing a client's legal question, you will likely give more weight to mandatory authority than to persuasive authority. However, persuasive authority may still be helpful, especially if the binding jurisdiction does not have law addressing the issue or if you are advocating for a change in the law. [Table 2-F](#) lists some of the authorities that you might rely on when analyzing a client's legal question and describes the weight of each.

#### Table 2-F • Authorities and their weight

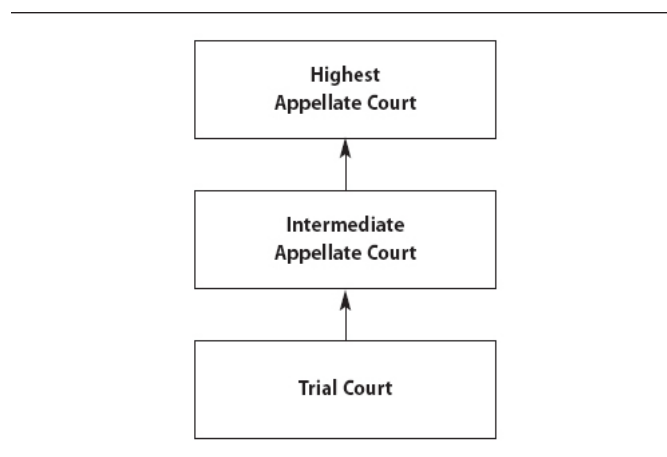


Sources of Law	Who Makes Them	Type of Authority	Weight of Authority (in governing jurisdiction)
Constitutions	Sovereigns (nations and states)	Primary	Mandatory
Statutes	Legislature	Primary	Mandatory
Regulations	Government agencies	Primary	Mandatory
Case law	Judiciary	Primary	Mandatory (depending on level of court)
Executive orders	Executive branch	Primary	Mandatory
Legislative history	Legislature	Secondary	Persuasive
Law review or journal articles	Professors, experts, students, other writers	Secondary	Persuasive
Legal encyclopedias, dictionaries	Various legal writers	Secondary	Persuasive

## B. Hierarchical Court Systems

The structure of our federal and state court systems will affect how much weight you give to a judicial decision. Both the federal courts and the courts in each state are arranged hierarchically. In federal courts and in most state courts, the hierarchy is composed of three levels: a trial court, which is the “lowest court” in the hierarchy; an intermediate appellate court; and a final appellate court, which is sometimes referred to as the “court of last resort” ([Figure 2-G](#)).

**Figure 2-G • Traditional court hierarchy**



Litigation begins in the trial court. After a final decision is reached in the trial court, any party not satisfied with the decision may appeal to the intermediate appellate court and ask the appellate court to review the decisions of the trial court. Usually, a person may appeal to an intermediate appellate court “as of right,” which means that any party who is not satisfied can have the intermediate appellate court review the decisions of the trial court.

If a party is not satisfied with the result in the intermediate appellate court, the party may appeal to the final appellate court. Typically, however, a party is not entitled to have the highest court review the intermediate court’s decision. Rather, the party must petition the highest court and ask that it hear the appeal. If the highest court believes that reviewing the intermediate court’s decision will resolve a novel or important legal issue, it may grant the petition, often known as “granting certiorari,” and hear the appeal.

At each level, within a given jurisdiction, courts are bound by the prior decision of the courts above it. That is, the decisions of higher courts are mandatory authority for lower courts within that jurisdiction. Thus, when a trial court is deciding an issue, its decision must follow and be consistent with the decisions of the intermediate and highest appellate courts in its jurisdiction. An intermediate court must follow and be consistent with the decisions of the highest appellate



court. By contrast, the decisions of a lower court are merely persuasive authority to the courts above it in the same jurisdiction.

In this hierarchical system, attorneys give greater weight to decisions from higher courts because those decisions control the decision-making in the courts below. As a result, you'll need to become familiar with the court hierarchy of the jurisdiction that governs your client's legal question.

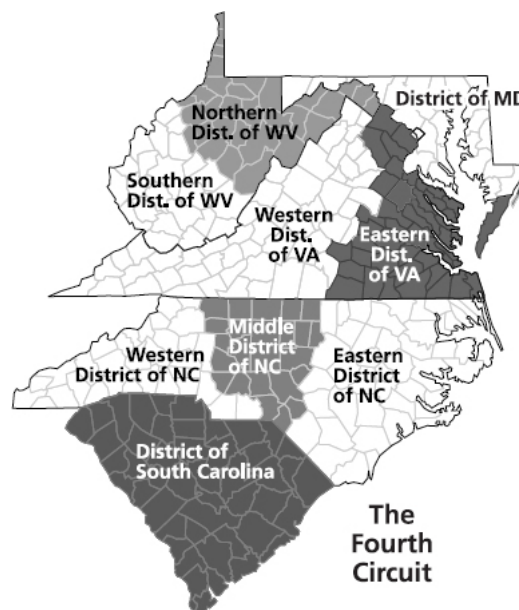
### 1. Hierarchy in the federal courts

In the federal court system, trial courts are called "United States District Courts." Each state has one or more federal districts. An entire state may be designated as one federal district, or if the state is populous, the state will be divided into two or more federal districts. For example, a less populous state such as South Carolina has only one federal district—the District of South Carolina. The more populous North Carolina is divided into three federal districts: the Western District of North Carolina, the Middle District of North Carolina, and the Eastern District of North Carolina. [Figure 2-H](#) shows how South Carolina and North Carolina (along with Maryland, Virginia and West Virginia) are divided into districts.

Each federal district has its own trial court. For example, in the District of South Carolina, the federal trial court is the United States District Court for the District of South Carolina. In the Western District of North Carolina, the federal trial court is the United States District Court for the Western District of North Carolina.

Thus, if you see a federal judicial opinion coming out of a *district* court, you know that the decision is from a trial court, and you can assess its weight accordingly.

**Figure 2-H • Federal districts within a federal circuit**



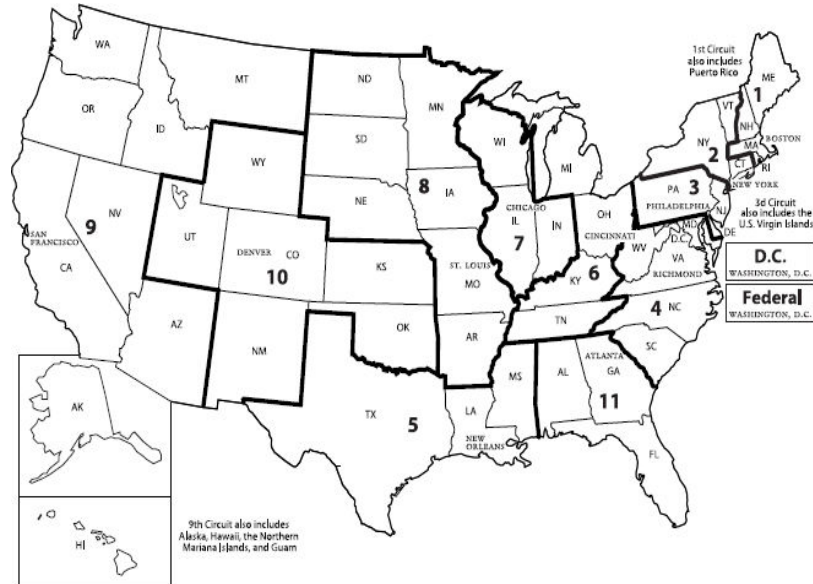
Next in the federal court system are the circuit courts of appeals. These intermediate courts of appeal are arranged into thirteen circuits (*see* [Figure 2-I](#)). Eleven of the thirteen circuits are numbered. Each circuit includes federal districts of a number of states. For example, the Fourth Circuit includes the federal districts of five states—West Virginia, Virginia, Maryland, North Carolina, and South Carolina. The United States Court of Appeals for the Fourth Circuit hears appeals from the district courts in each of those five states. [Figure 2-H](#) depicts the entire Fourth Circuit Court of Appeals.

Two of the thirteen circuits are special circuits. The District of Columbia has its own circuit court, the United States Court of Appeals for the District of Columbia. That court hears appeals from the United States District Court for the District of Columbia, as well as appeals from some administrative agencies and from the United States Tax Court.

The thirteenth circuit is the Federal Circuit. The Court of Appeals for the Federal Circuit, which sits in Washington D.C., is not defined by a region but instead by the kinds of appeals it

hears. The court of appeals for the Federal Circuit hears appeals from specialized courts such as the Court of International Trade, United States Court of Federal Claims, and the United States Court of Appeals for Veterans' Claims. In addition, it will hear any appeal involving patent law.

**Figure 2-I • Federal circuits**



The United States Supreme Court is the highest court in the federal court system. It reviews decisions from all thirteen circuits and is the “court of last resort.” Litigants unhappy with a decision from a federal court of appeals must petition the Supreme Court to hear their appeals. Of the more than 7,000 petitions the Court receives each year, it usually grants certiorari to one hundred or fewer cases.<sup>10</sup>

## 2. State court hierarchies

Typically, state courts have the same three-part structure, although some variety exists. For example, several states don’t have an intermediate court of appeals.<sup>11</sup> And sometimes the names of courts will vary. In New York, for example, the lowest court is named the Supreme Court and the highest court is named the Court of Appeals.

Before reading state court decisions, you should be certain that you understand that state’s judicial hierarchy because it affects the weight you will give to a decision. To quickly determine a state’s highest and intermediate courts, you can turn to Appendix 1 in the *ALWD Citation Manual*<sup>12</sup> or Table 1 in *The Bluebook* citation manual,<sup>13</sup> which list the highest and intermediate courts in each state.

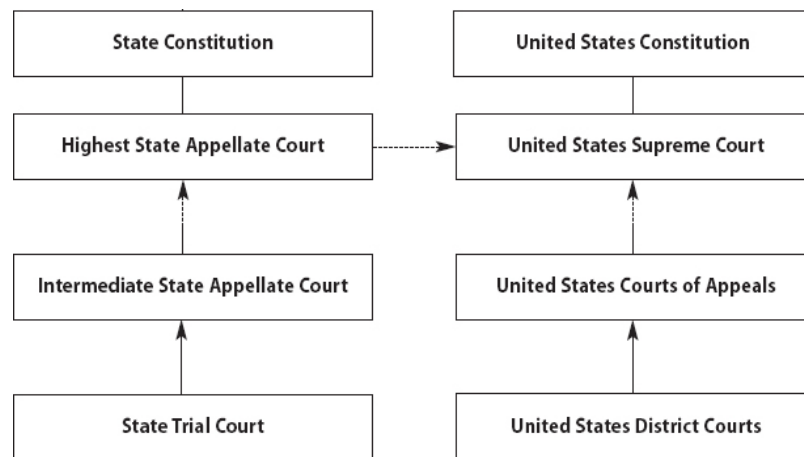
## 3. Side-by-side court systems

The federal court system is not hierarchically *above* the state court systems ([Figure 2-J](#)). Because a state is its own sovereign jurisdiction, state courts have final say about how to understand and apply state law.

The United States Supreme Court may review a state court decision only to determine whether it misinterprets the United States Constitution or other federal law. If the United States Supreme Court determines that the state court decision misinterprets federal law, then the Supreme Court will reverse that part of the state court decision.

Otherwise, the state court system operates independently of the federal court system, and the two systems simply co-exist in the same regions.

**Figure 2-J • The hierarchy of federal and state court systems**



### C. Stare Decisis

Finally, the principle of stare decisis will require you to look for the most factually similar cases in order to predict an outcome in your client's case. The words stare decisis are the first two words in the longer Latin phrase *stare decisis et quia non movere*, which means "to stand by things decided and not disturb settled points."<sup>14</sup> Stare decisis requires a court to follow its own prior decisions when faced with the same legal issue.

Stare decisis transforms individual court decisions into law. Because a court is required to follow its own prior decisions, a single decision affects more than the parties in that case. Absent some significant change in the law or society, the court will follow that prior decision in all future cases presenting the same legal issue.

The principle of stare decisis is triggered by precedent. Precedent is a binding prior court decision. A prior decision is binding on a court only if it raises the same legal issue as the case currently before the court. To raise the same legal issue, two cases must be governed by the same law and have similar facts.

A significant amount of litigation focuses on whether a prior decision is precedent for a current case. Often, attorneys argue about whether the case currently before the court is factually similar to the prior case. If the attorney convinces a court that the current case is factually similar, then the court will be bound by the reasoning and conclusion of the prior decision. If the opposing attorney convinces the court that the prior case is not factually similar, then the prior case is not precedent and the court will not be bound by the outcome of that prior case.

Because the factual similarity of a current case to a prior case generally determines whether a court will be bound by the prior case, in your research and analysis you will look for and give the most weight to those prior cases that are most factually analogous to your client's case. The precedential value of a prior case depends upon whether you can demonstrate that the facts of your case are sufficiently similar to the facts that determined the outcome in the prior case.

Stare decisis alters how we weigh case law. For example, typically, a decision from a higher court within a jurisdiction is given more weight than a decision from a lower court in that same jurisdiction. If, however, the decision of the lower court analyzes facts that are very similar to your client's facts, the factually analogous lower court decision will likely become central to your prediction about how a court in that jurisdiction will view the client's case.

For the same reason, a case that is only persuasive authority may rise in your estimation if it is factually similar to your client's case. If no case in the governing jurisdiction is factually analogous, you may look for factually analogous case law in another jurisdiction, provided that the other jurisdiction has a similar legal framework. Thus, even though the case is from another jurisdiction, and is only persuasive authority, it may be given more weight in your analysis due to its factual similarity.

### D. The Effect of These Three Principles

These three principles—jurisdiction, the hierarchical court systems, and stare decisis—exert profound influences on our legal system.

First, these principles create consistency and fairness. Once a higher court reaches a decision in that case, not only will that court be bound by that decision, but so will all the lower courts within that jurisdiction. Thus, these principles ensure that two litigants will be treated the same by the courts within that jurisdiction.

Second, these principles create predictability. Attorneys can look for factually similar decisions within a jurisdiction and then predict how courts will react to future conduct. When lawyers can predict the legal consequences of future conduct, individuals can make informed choices about decisions in business or in their personal lives.

Finally, these principles allow for diversity because each jurisdiction within the United States has the opportunity to create laws appropriate to that jurisdiction, so long as those laws do not conflict with the United States Constitution. Thus, along with consistency and predictability, these principles also allow for great diversity.



The legal system, and the law it generates, is often referred to as a single, monolithic entity —“the law.” “The law,” however, is a synthesis of laws, often from different sources and arranged according to the weight we give each authority. As an attorney, your job is to explain the law as it will affect your client’s case. To do so, you will weigh and then weave together authorities from different sources to create a legal tapestry that is unique to that client’s case.

Among the many authorities you will work with, court decisions are the most challenging to weave into the pattern. To determine how a prior court decision fits within the pattern of the law, you will have to consider the prior court’s jurisdiction and the court’s place within the judicial hierarchy. Most importantly, whether a prior decision is featured or simply part of the pattern’s background depends on a seemingly simple conclusion: Is the prior decision like your client’s case or not?

### Practice Points



- To determine the law that governs your client’s legal question, you will have to read a variety of legal sources, assess their weight and relevance, and then synthesize those authorities to create a summary of the law relevant to your client’s legal question.
- Authority comes in two forms: primary and secondary. Primary authority must be published by one of the three branches of government. Secondary authority is a legal source that describes the law.
- Case law is any judicial decision. Common law is a subset of case law. It includes only those judicial decisions made by courts in the absence of an enacted statute.
- Jurisdiction is the area of authority over which a court has control.
- Binding or mandatory authority is primary authority that controls the legal issue because it comes from the jurisdiction governing the legal dispute. Authority from other jurisdictions or secondary sources is persuasive authority.
- Federal and state court systems operate side-by-side. Each is typically a three-tiered system. Trials originate in the lowest courts. Intermediate courts generally hear appeals as of right. The highest court hears only selected appeals.
- Stare decisis requires courts to adhere to decisions of a prior court addressing the same legal issue. Whether a prior court decision addresses the same legal issue is often a matter of debate.

<sup>1</sup> Except in Nebraska, which does not have a bicameral legislature.

<sup>2</sup> 4 West’s Ency. of Am. L. *Executive Order* 273 (2005).

<sup>3</sup> Exec. Order No. 11,063, 3 C.F.R. 652, *reprinted in* 42 U.S.C. § 1982 app. at 6-8.

<sup>4</sup> Exec. Order No. 13224, 66 Fed. Reg. 49079 (Sept. 23, 2001).

<sup>5</sup> Categories borrowed from David S. Romantz & Kathleen Elliott Vinson, *Legal Analysis: The Fundamental Skill* 5-6 (Carolina Acad. Press 1998).

<sup>6</sup> See *Black’s Law Dictionary* 867 (8th ed. 2004).

<sup>7</sup> For example, in Civil Procedure you will learn about subject matter jurisdiction, diversity jurisdiction, and long arm jurisdiction, to name a few.

<sup>8</sup> Tribal nations are a third sovereign in the United States, and thus some citizens are governed by three sovereigns.

<sup>9</sup> The United States includes “more than fifty other jurisdictions” because it also includes the District of Columbia and five territories (American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands), all with their own legislatures, executives, and court systems.

<sup>10</sup> James C. Duff, Judicial Business of the United States: 2006 Annual Report of the Director, <http://www.uscourts.gov/judbus2006/contents.htm>; select Tables A-1 and B-2 (accessed June 20, 2007).

<sup>11</sup> Delaware, Maine, North Dakota, South Dakota, Vermont, West Virginia, and Wyoming are states without typical intermediate courts.

<sup>12</sup> ALWD & Darby Dickerson, *ALWD Citation Manual: A Professional System of Citation* 359–405 (3d ed., Aspen Publishers 2006).

<sup>13</sup> *The Bluebook: A Uniform System of Citation* 193–242 (Columbia Law Review Ass’n et al. eds., 18th ed. 2005).

<sup>14</sup> Bryan Garner, *A Dictionary of Modern Legal Usage* 827 (Oxford U. Press 2d ed. 2001).

## Chapter 3

# Reading for Comprehension

### [I. Learning to Read for a Purpose](#)

### [II. Reading Statutes](#)

#### [A. Basic Structure of a Statute](#)

#### [B. Reading Statutes Critically](#)

### [III. Reading Judicial Opinions](#)

#### [A. Basic Parts of a Judicial Opinion](#)

#### [B. Reading Judicial Opinions Critically](#)

Reading the law is not always a natural, intuitive process; instead, good legal reading is a learned skill.

This chapter explains how to critically read the legal authorities controlling your client's question. *Critical reading* is defined as "thinking while you read."<sup>1</sup> Put differently, critical reading means actively engaging each bit of information and questioning it rather than passively accepting every word as written.<sup>2</sup>

You must read legal authorities critically because the goal of legal reading is not just to get the gist of the idea, but to deeply comprehend the material so that you can analyze your client's legal question. As a result, legal reading is a demanding task, requiring that you read carefully, comprehensively, and efficiently.

Although this chapter focuses on reading two primary sources of law, statutes and cases, you can use critical reading skills for any source, from law review articles to the latest novel.

## I. Learning to Read for a Purpose

Reading the law is different from most types of reading. In other disciplines, you may read generally and broadly for the big picture. In legal reading, you need the big picture, but you also need to understand the details and the nuances of the material. In rocket science, having a calculation off by even one percent can change the entire trajectory of a rocket. The same holds true in legal reading: Failing to understand one word, failing to discern one sentence, phrase, or comma can change the entire analysis.

Reading has two aspects: speed and comprehension. Generally, the faster you read, the less you will comprehend. Conversely, the more you read for comprehension, the slower you will read. A lawyer, however, needs to read fast and comprehend deeply. You can do both provided you use the critical reading tools in this chapter.

So, how do you read critically? Taking three steps with everything you read can make you an expert critical reader who reads efficiently and effectively.<sup>3</sup> To read critically, you must (1) get context, (2) skim the text, and (3) read the text closely and question it. Look at the details of each step in [Table 3-A](#).

**Table 3-A • Three steps of critical reading**

<b>1. Get context.</b>	Figure out the who, what, when, where, why, and how of the material: <ul style="list-style-type: none"><li>• Who are the key parties?</li><li>• What are you reading?</li><li>• When was it written?</li><li>• Where is its position in the body of law?</li><li>• Why is the authority important — is it controlling or persuasive authority?</li><li>• How does the authority analyze the issue?</li></ul>
<b>2. Skim the text.</b>	Get a comprehensive overview of the substance before you get into the details.
<b>3. Read and question the text.</b>	Read slowly and closely, thinking about the purpose of each word or phrase and how the substantive parts fit together.

The most effective legal readers may repeat the third step multiple times. Reading legal authority is a recursive process that builds on itself. You may read a legal authority fairly well the first time; however, you will see things in a case or statute during your third or fourth read that you did not see the first time. As you analyze other authorities that address the same issue, you become a smarter reader. When you then return to a legal authority, you will be able to read it with greater depth and understanding.

Reading authorities carefully, multiple times, may seem like a daunting, time-consuming task. You will, however, get faster as you gain more experience. The rest of this chapter applies these critical reading steps to statutes and judicial opinions.

## II. Reading Statutes

To discern the most likely interpretation of a statute, you must understand what the statute says. To do that, you must critically read the statute. (The full process of statutory interpretation is covered in [Chapter 11](#), *Statutory Analysis*.)

### A. Basic Structure of a Statute

To read a statute, you must first understand how statutes are structured when they are published.

In a majority of states and in federal law, statutes are organized into “titles.” A “title” is simply a group of statutes organized by topic. For example, in the federal system, Title 18 includes all statutes relating to “Crimes and Criminal Procedure.” Titles are then broken down into “articles” or “chapters.” The articles or chapters are then broken down into “sections.”

You can see this structure in the federal kidnapping statute in [Example 3-B](#). Title 18, Crimes and Criminal Procedure, is broken down into chapters, and one of those chapters, Chapter 55, addresses “Kidnapping.” Chapter 55 is then broken down into sections, including § 1201, which defines kidnapping and lists the elements of the crime.

In a minority of states, the statutes are first organized into “chapters,” rather than “titles.” The chapters are then broken down into “articles,” and the articles are broken down into “sections.”<sup>4</sup> You can see this structure in Nebraska’s kidnapping statute, which is in [Example 3-C](#).

Although a statute may be only one section long, typically, statutes consist of multiple related sections, as do the kidnapping statutes in [Examples 3-B](#) and [3-C](#). Attorneys use the word “statute” loosely. They may use the word “statute” to refer to one “section,” or they may use the word “statute” to refer to multiple related sections. For our purposes, we will use the word “statute” to refer to one section and “statutory scheme” to refer to multiple interrelated sections.

#### Example 3-B • Federal kidnapping statutes

##### Title 18—Crimes & Criminal Procedure Chapter 55—Kidnapping

The list of sections at the beginning of the chapter acts as a table of contents.

Sec.

**1201. Kidnapping.**

**1202. Ransom Money.**

**1203. Hostage taking.**

**1204. International parental kidnapping.**

The section title, “Kidnapping,” tells you what the section is about, but it is not technically a part of the statute.

#### §1201. Kidnapping

(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when—

(1) the person is willfully transported in interstate or foreign commerce, regardless of whether the person was alive when transported across a State boundary, or the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate or foreign commerce in committing or in furtherance of the commission of the offense;

...

shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.

...

(h) As used in this section, the term “parent” does not include a person whose parental rights with respect to the victim of an offense under this section have been terminated by a final court order....

These are subsections of §1201.



(June 25, 1948, ch. 645, 62 Stat. 760; Aug. 6, 1956, ch. 971, 70 Stat. 1043 ... Oct. 12, 1984, Pub. L. 98-473, title II, § 1007, 98 Stat. 2139; Nov. 10, 1986, Pub. L. 99-646, §§ 36-37(b) 100 Stat. 3599.)

These are historical notes to §1201.

### **§1202. Ransom Money**

(a) Whoever receives, possesses, or disposes of any money or other property or any portion thereof, which has at any time been delivered as ransom or reward in connection with a violation of §1201 of this title, knowing the same to be money or property which has been at any time delivered as such ransom or reward, shall be fined under this title or imprisoned not more than ten years, or both....

(June 25, 1948, ch. 645, 62 Stat. 760....)

### **Example 3-C • Nebraska state kidnapping statutes**

#### **Chapter 28—Crimes and Punishments**

##### **Article 3—Offenses Against Persons**

The list of sections found at the beginning of the chapter acts as a table of contents.

#### **Section**

**28-301. Compounding a felony, defined; penalty.**

**28-302. Homicide; terms, defined.**

...

**28-312. Restrain, abduct; defined.**

**28-313. Kidnapping; penalties.**

**28-314. False imprisonment in the first degree; penalty.**

**28-315. False imprisonment in the second degree; penalty.**

...

The section title, “Restrain, abduct; defined” tells you what the section is about, but it is not technically a part of the statute.

#### **§28-312. Restrain, abduct; defined.**

As used in sections 28-312 to 28-315, unless the context otherwise requires:

(1) Restrain shall mean to restrict a person’s movement in such a manner as to interfere substantially with his liberty:

- (a) By means of force, threat, or deception; or
- (b) If the person is under the age of eighteen or incompetent, without the consent of the relative, person, or institution having lawful custody of him; and

(2) Abduct shall mean to restrain a person with intent to prevent his liberation by:

- (a) Secreting or holding him in a place where he is not likely to be found; or
- (b) Endangering or threatening to endanger the safety of any human being.

These are subsections of §28-312.

**Source:** Laws 1977, LB 38, §27

These are historical notes to §28-312.

#### **§28-313. Kidnapping; penalties.**

(1) A person commits kidnapping if he abducts another or, having abducted another, continues to restrain him with intent to do the following:

- (a) Hold him for ransom or reward; or
- (b) Use him as a shield or hostage; or
- (c) Terrorize him or a third person; or
- (d) Commit a felony; or
- (e) Interfere with the performance of any government or political function.

(2) Except as provided in subsection (3) of this section, kidnapping is a Class IA felony.

(3) If the person kidnapped was voluntarily released or liberated alive by the abductor and in a safe place without having suffered serious bodily injury, prior to trial, kidnapping is a Class II felony.

**Source:** Laws 1977, LB 38, §28.

The sections within a statutory scheme are often organized in a common pattern. The sections at the beginning of a statutory scheme will usually identify the statute’s name, its purpose, any findings on which the legislation was based, definitions, and the scope of the legislation. Operative provisions come next. Those sections explain the general rule, any exceptions to the rule, the consequences of violating the rule, and how the rule will be enforced. Some statutes also include closing provisions. Closing provisions identify the effective date of the statute and create severability, which is the idea that if one part is determined invalid, the rest will continue to operate.<sup>5</sup>

Some statutes may not include all of these parts; however, you can see the Nebraska kidnapping statute, in [Example 3-C](#), follows this basic pattern. Definitions, in § 28-312, are described before the operative section, § 28-313, which explains the prohibition against kidnapping and the consequences if someone is found guilty of kidnapping.

## B. Reading Statutes Critically

The three critical reading steps described above apply to statutes. [Table 3-D](#) shows you how.

**Table 3-D • Three steps of critical statutory reading**

<b>1. Get context for the statute.</b>	<ul style="list-style-type: none"> <li>• To whom does the statute apply?</li> <li>• What does the statutory section govern?</li> <li>• In what jurisdiction does the statute apply?</li> <li>• What kind of statute is it—criminal or civil?</li> <li>• When did the statute go into effect?</li> <li>• Where is the statute located within the statutory scheme?</li> <li>• How does the statute operate—requiring behavior or prohibiting or allowing behavior?</li> </ul>
<b>2. Skim the most pertinent statutory sections.</b>	<ul style="list-style-type: none"> <li>• What behavior does the statute prohibit, require, or simply permit?</li> <li>• Does the statute have any limiting language or exceptions?</li> <li>• Does the relevant section cross-reference other sections?</li> <li>• Do any definitions from other sections in the statutory scheme control the words in the section relevant to your client?</li> <li>• Does the statute contain elements, factors, or both?</li> </ul>
<b>3. Read the text closely and question it.</b>	<ul style="list-style-type: none"> <li>• Read carefully, slowly, and critically, marking any phrases, words, or punctuation that could affect the meaning of the statute.</li> <li>• Highlight every “red flag word” and understand its function in the text.</li> <li>• Break down the statute into its components, whether elements, factors, or both.</li> <li>• Think about how the statute, on its face, applies to your client’s question.</li> </ul>

Look at each of these steps, and see why they are important in reading a statute.

### 1. Get context

Typically, to answer a client’s legal question, you will focus on one or two statutory sections; however, those sections must be read in the context of the whole statutory scheme.

For example, suppose you have been asked to research whether a father can be guilty of kidnapping his step-child. Your client has been charged under federal law, and you have identified 18 U.S.C. § 1201 as the statutory section that prohibits kidnapping. Your first step in understanding that section would be to consider its relationship to other statutes within the statutory scheme that addresses kidnapping.

You can get a quick overview of a statutory scheme by reviewing the table of contents for the relevant statutory sections. In [Example 3-B](#), the kidnapping statute is preceded by a list of sections that make up the statutory scheme. The list is composed of section titles. Reading those section titles shows how the section relevant to your client’s question fits within the statutory scheme. Reviewing the list may also alert you to other sections that may be relevant to your client’s question.

In addition to reviewing this list, many attorneys find it helpful to look at a print edition of the statute and flip through the sections to develop a better sense of the statutory scheme as a whole. For instance, if your client had been charged under the Nebraska state kidnapping statute, Nebraska Revised Statute § 28-313 (shown in [Example 3-C](#)) you would find it very helpful to skim the sections surrounding § 28-313, the section that defines “kidnapping.”

Skimming for context would alert the attorney that an earlier section, § 28-312, defines some of the terms used in the later section, § 28-313.

After reviewing how the relevant section fits within the larger statutory scheme, you will want to gather some background information about the section most relevant to your client's question. For example, you should ask whether the statute is criminal or civil because that affects the procedural rules that will govern the litigation and the penalties that will apply if your client is held responsible.

You should also verify that the section you are reading governs your client's legal question. Of course, the statute must be from the governing jurisdiction. In addition, you should verify that the statute you have found was in effect at the time your client's legal problem arose. Sections can be added or modified at various times. Sometimes a provision within a statutory scheme will state the section's effective date. If no such provision exists, look at the section's historical notes and scan the dates. If the historical notes include any dates since the time your client's problem arose, you will know that the section has been modified in some way. A reference librarian can help you find the statute in force at the time your client's problem arose and the public laws that modified the statute.<sup>6</sup>

## **2. Skim the most pertinent statutory sections**

Now that you have context, the next step is to get a better understanding of how the statutory section works. Skimming the relevant section will help you gain an initial understanding of how it works.

For example, skimming §1201 (in [Example 3-B](#)) will allow you to see the purpose of each sub-section. Sub-section 1201(a) tells you what actions constitute kidnapping. A later sub-section, §1201(h), defines the word "parent," a term that will be relevant to your client.

Skimming will also allow you to see the relationship among subsections within a section. For instance, think about the question you need to answer: Can a father be charged with kidnapping his step-child, or is he a "parent," and thereby exempt? You may initially examine only sub-section 1201(a), which explains that "any" person may be guilty of kidnapping; however, sub-section 1201(a) cannot be read alone. To correctly answer your client's question, you will need to note that sub-section 1201(h) defines the term "parent" and states parents who take their minor child cannot be prosecuted.

While skimming, you should also note whether the statute is made up of elements, factors, or both. [Chapter 4, Finding Your Argument](#), will give a detailed explanation of elements and factors, but for now just know the basic definitions: Elements are requirements that must be met before a standard can be established. Every element must be met for a standard to apply. A factor is a condition that a court can consider when determining whether a standard is met. Usually factors are weighed by the court, and not all factors must be met for a party to win.

For example, the federal kidnapping statute is made up of elements because the operative part of the statute has distinct requirements that must be met for the crime to occur. Although you will carefully parse the elements in the next stage of critical reading, be aware of the statute's composition as you skim.

Finally, you should note whether the section cross-references any other sections. If a section cross-references another section, you will have to read the cross-referenced section as well to see how it affects the provision that governs your client's question. For instance, § 1202, Ransom Money, makes an explicit cross-reference to § 1201. The cross-reference tells you that the provision about ransom money applies only if kidnapping charges in § 1201 have been proven.

Now that you have skimmed the statute and you understand generally how the statute works, you are ready to dig into the meat of the text to understand exactly how it operates.

## **3. Read the text closely and question it**

To understand exactly how the statute controls your question, you must read the statute, slowly and carefully, noting each significant word, phrase, or punctuation mark. The words themselves are the foundation for your analysis. You must give every word effect because even innocuous words can change how the statute is construed.

As you read the statute word-by-word, you will want to particularly note two groups of words. First, you will want to note any "red flag" words that affect the statute's operation.

Second, you will want to group the words into the elements or factors that will satisfy the statute.

(a) Red flag words

“Red flag” words are words or phrases that signal some action or restriction. These words may also be called “special operative” words. Red flag or special operative words include any conjunctions, permissive words, limiting words, or language of exception, and they can limit, dictate, or allow behavior ([Table 3-E](#)). Because statutory language requires precise understanding, take special care to mark all of the red flag words.

**Table 3-E • Red flag words**

• And	Requires all elements that it joins to be present for a standard to be met, or requires all factors that it joins to be considered.
• Or	Only one of the elements it joins must be present for a standard to be met, or only one of the factors that it joins must be considered.
• Either	
• Unless	Creates an exception to the standard.
• Except	
• If ... then	
• Shall*	Mandates conduct.
• Must	
• Shall not	Prohibits conduct.
• May not	
• Must not	
• Provided that**	Creates a condition, an exception, or adds an additional requirement.

\* Although “shall” is typically interpreted as mandatory language, courts sometimes construe it as permissive. See Bryan A. Garner, *Legal Writing in Plain English: A Text with Exercises* 105-06 (Univ. Chic. Press 2001).

\*\* See *id.* at 107-08 (discussing the multiple meanings of “provided that” and recommending that drafters avoid the phrase).

Words in common speech may have different meanings than they do in a statute. Ordinary words like the word “shall” might mean “will.” In a statute, however, the word “shall” can mean far more; it can expand or limit a person’s right or duty to act, or it can tell a court how to act or to refrain from acting. So, in a statute, “shall” can present either a mandatory or permissive meaning, depending on the context. In [Example 3-F](#), you can see how “shall” differs depending on the context.

**Example 3-F • Connotations of “shall”**

**“Shall” in a statute**

In the Kidnapping Act, any person who commits the act of kidnapping “shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.” 18 U.S.C. §1201(a).

**“Shall” in verse**

“Well, if any man in Italy have a fairer table which doth offer to swear upon a book, I shall have good fortune.” William Shakespeare, *The Merchant of Venice*, Act II, Scene II.

In the statutory excerpt in [Example 3-E](#), the word “shall” means “must,” and the court has no discretion in allowing a sentence less than the options the statute sets out. Although “shall” does not always mean “must,” it does mean “must” in the statutory example.

In the second excerpt in [Example 3-F](#), “shall” is used in the subjunctive tense and is expressing a wish or a command. At most, the use of “shall” here could mean “will,” but the word does not mean “must” as it did in the statutory excerpt.

As you get deeper into statutory analysis and interpretation later in this book ([Chapter 11, Statutory Analysis](#)), you must understand the red flag words and their specific functions. For now, be aware that terms can be ambiguous, so read the statute carefully to understand how each term regulates the bounds of behavior.

(b) Elements and factors

Finding the red flag words and phrases can help you identify the elements or factors needed to satisfy the standard set out in the statute. For example, the federal kidnapping statute is

diagrammed in [Table 3-G](#). To meet the standard, any person who meets each of the elements listed in §§1201(a)(1-5) commits kidnapping.

**Table 3-G • Diagramming the kidnapping statute**

---

1. Unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away

**AND**

2. holds for ransom, reward, or otherwise

**WHEN**

3. the act is done within the federal jurisdiction through interstate commerce or to a particular group of people

**EXCEPT**

The act will not apply to a parent taking his or her own child.

---

For kidnapping to occur, each of the three elements of the crime must be met. Thus, carrying someone from one location to another at that person’s request would not be kidnapping because the first element, that the carrying be unlawful, would not be satisfied.

Reading the statute carefully will require you to pay close attention to the words of the statute itself and the context of the subsection in the overall statutory scheme. Only by reading carefully can you properly interpret the statute and apply it to your client’s case.

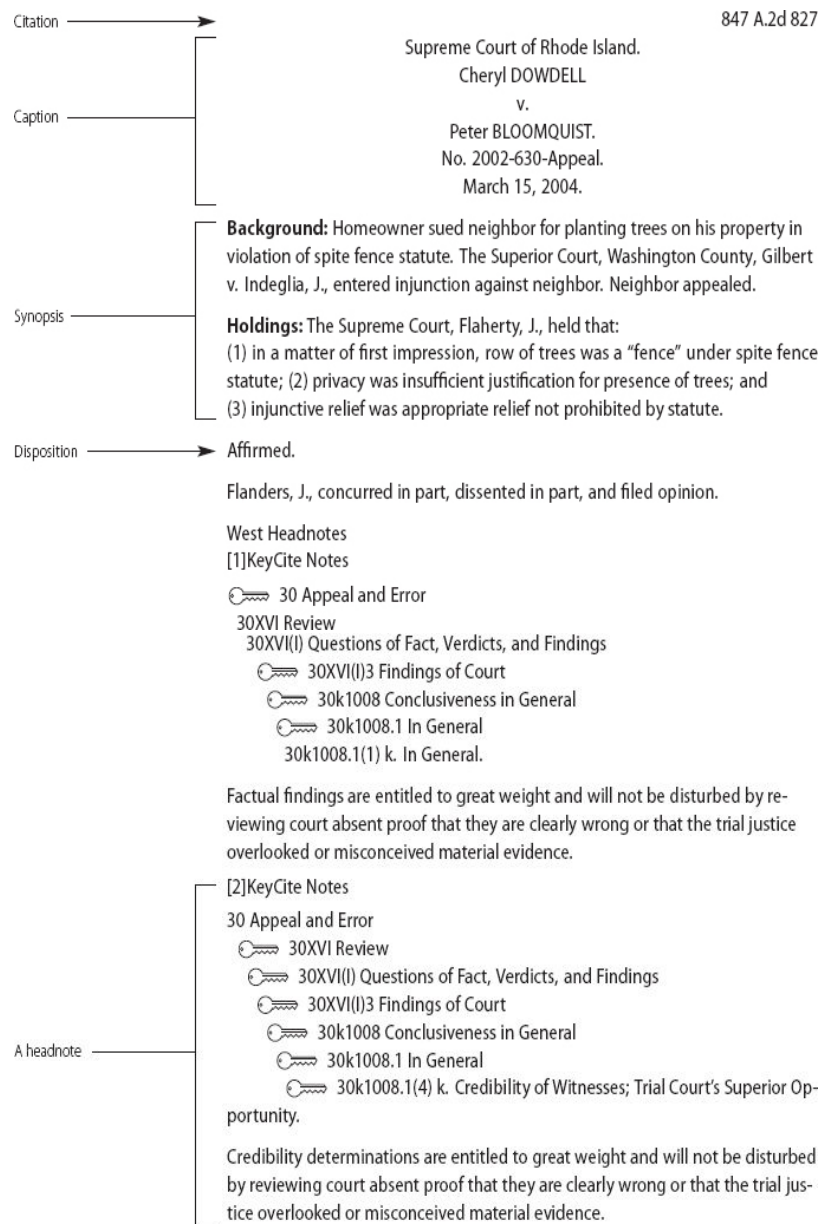
### III. Reading Judicial Opinions

The second major type of authority you will need to read well is judicial opinions. Critical reading skills will make reading judicial opinions much easier. First, understand the parts of a judicial opinion.

#### A. Basic Parts of a Judicial Opinion

A judicial opinion explains the dispute before the court, the legal questions the dispute raises, and the ruling the court has made on the legal questions. A judicial opinion typically contains four parts, each of which performs a function: procedural information, contextual information, the court's analysis, and the publishing tools used by the publishers of the case reporters. To see these parts, look at [Figure 3-H](#).

Figure 3-H • A reported case\*



\* This sample case is based on *Dowdell v. Bloomquist*, 847 A.2d 827 (R.I. 2004). It has been edited. Individual edits are not noted in the text.

...

**OPINION: Flaherty, J.**

The official opinion begins here.

Procedural history is described in the first paragraph.

The plaintiff, Cheryl Dowdell, brought this action in Superior Court alleging that the defendant, Peter Bloomquist, planted four western arborvitae trees on his Charlestown property solely to exact revenge against her, to retaliate by blocking her view, and in violation of the spite fence statute. The presiding Superior Court justice found that the trees were planted to satisfy defendant's malicious intent, not his pretextual desire for privacy. The trial justice granted plaintiff injunctive relief. We affirm the judgment of the trial justice.

The underlying facts are described in the second paragraph.

The facts pertinent to this appeal are as follows. The parties' homes are on adjoining lots. Dowdell's home sits at a higher elevation than Bloomquist's and has a distant view of the ocean over the Bloomquist property. In June 2000, defendant acquired the home from his mother. Prior to that time, the Dowdell family had an amicable relationship with defendant's mother. Change was in the wind in the fall of 2000, however, when defendant petitioned for a zoning variance seeking permission to build a second-story addition to his home. The plaintiff expressed concern about the petition, anxious that the addition would compromise her view of the Atlantic Ocean. For six months the parties argued before the Zoning Board of Review as to the merits of the addition. As a result, the relationship between the neighbors became less than friendly. In March 2001, defendant began clearing land and digging holes to plant the disputed trees in a row between their homes. In April, defendant's counsel sent a letter to plaintiff warning her against trespass onto the Bloomquist property. In May, one day after the zoning board closed its hearing on defendant's variance request, defendant began planting the four western arborvitae trees that now stand in a row bordering the property line. The forty-foot-high trees enabled little light to pass into Dowdell's second- and third-story picture windows.

More procedural history is described in the third paragraph.

The trial justice made a finding that the row of trees were a fence. He further found that the objective of privacy claimed by defendant was "no more than a subterfuge for his clear intent to spite his neighbors by erecting a fence of totally out of proportion trees." Hence, the trial justice found that the trees constituted a spite fence. He noted testimony that plaintiff's real estate values had depreciated by as much as \$100,000. Bloomquist was ordered "to cut the four Western Arborvitae to no more than 6' in height and keep them at that level or remove them entirely with no more Western Arborvitae to be planted."

The court addresses a preliminary issue: whether a row of trees may be considered a fence.

This is the first occasion this Court has had to address the issue of whether a row of trees may be considered a fence within the meaning of the spite fence statute, § 34-10-20. We believe the trial justice properly referred to the definition of "lawful fences" found in the statute to understand the simple meaning and legislative intent behind its use of the word "fence." Based upon the language of § 34-10-1, a fence clearly includes a hedge. And based upon the expert testimony relied on by the trial justice, a row of western arborvitae trees may constitute a hedge. However, even if the trees were not a hedge per se, the spite fence statute refers to "[a] fence or other structure in the nature of a fence." The trial justice considered the proximity of the four trees that touched one another, and the broad span of sixty feet across which they spread, and rationally interpreted that the trees were a fence. We believe that the trees, when taken as a whole, fall well within the statutory definition of a "structure in the nature of a fence." This may not be the most optimal species for the creation of a hedge owing to their enormous stature and girth. However, it is specifically because of their towering presence, as well as their relative positioning on defendant's land, that we can consider the trees nothing less than a fence. What makes a spite fence a nuisance under the statute is not merely that it blocks the passage of light and view, but that it does so "unnecessarily" for the malicious purpose of annoyance.

The court reaches a holding about whether trees can be a fence in the second to last sentence of the paragraph.

The next issue the court addresses is the defendant's main argument, that he planted the trees for privacy.

We next consider defendant's contention that the trial justice erroneously discounted defendant's testimony that the trees were erected for the beneficial purpose of privacy. Defendant relies on *Musumeci v. Leonardo*, 77 R.I. 255, 259-60, 75 A.2d 175, 177-78 (1980), for the proposition that when a fence is erected for a useful purpose, despite spiteful motive, no relief may be granted. We recognize that some useful purpose for a fence may render the victim of one even maliciously erected without a remedy. In *Musumeci*, this Court determined that a fence served the useful purpose of preventing water from entering the premises of the



first floor of the complainant's house. Hence, because the purpose of the fence was not wholly malicious, it was not enjoined as a private nuisance. *Musumeci*, 77 R.I. at 258-59, 75 A.2d at 177.

The court reaches a holding about the defendant's privacy argument.

However, based on the turbulent history between the parties, the provocative statements made by defendant, the notice of trespass letter sent to plaintiff, and the size, timing, and placement of the trees, we cannot say that the trial justice was wrong to give defendant's testimony little weight and to find his claim that the fence was installed to enhance his privacy lacked credibility. In the circumstances of this case, we agree with the trial justice that defendant needed to provide more than just privacy as justification for the fence. This is especially true when a row of smaller arborvitae already stood between the homes. As the trial justice noted, "Accepting privacy alone would simply result in the statute being rendered meaningless and absurd." The very nature of a fence is such that privacy could always be given as the reason for erecting it. In an egregious case such as this, where evidence of malicious intent plainly outweighs the discounted benefit claimed by defendant, the court correctly found defendant's actions to violate the spite fence statute.

The court states the disposition.

### **Conclusion**

For the reasons set forth above, we affirm the judgment of the Superior Court. The record shall be remanded to the Superior Court.

## **1. Procedural information**

### **(a) The caption**

The caption is the case's title and sets out the parties. When listing the parties involved, the caption typically lists the full names of all the parties involved. In a civil case, the parties may be individuals, as in [Example 3-I](#).

#### **Example 3-I • Individuals in a civil action**

Cheryl DOWDELL v. Peter BLOOMQUIST

The parties may include entities, as in [Example 3-J](#).

#### **Example 3-J • An entity in a civil action**

WILLIAM HOWARD WEST, JR., and wife, CAROLYN SUE WEST v. KING'S  
DEPARTMENT STORE, INC.

In trial court opinions, the captions also tell which party is bringing the suit. The person instigating a civil lawsuit, known as the "plaintiff," is listed first, and the party being sued, the "defendant," is listed second. For example, in [Example 3-I](#), Ms. Dowdell is the plaintiff, and Mr. Bloomquist is the defendant.

In a criminal case, the prosecutor is the party instigating the suit and the defendant is the other party. If the prosecutor is the federal government, the caption might look like [Example 3-K](#).

#### **Example 3-K • Parties in a federal criminal action**

UNITED STATES OF AMERICA, Respondent/Appellee, v. TIMOTHY JAMES McVEIGH,  
Movant/Appellant.

If the prosecutor is a state, the caption might look like the one in [Example 3-L](#).

#### **Example 3-L • Parties in a state criminal action**

STATE OF OREGON, Appellant, v. FREDERICK WENGER, JR., Respondent.

On appeal, the caption will typically tell you which party is bringing the appeal. The terms "appellant" or "petitioner" follow the party who filed the appeal first. The terms "appellee" or "respondent" will follow the other party, who may also appeal some issues. The parties may



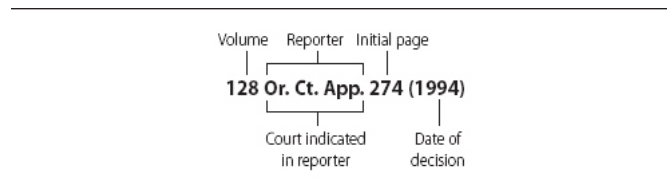
not be listed in the same order on appeal as they were in the trial court. In [Examples 3-K](#) and [3-L](#) you can see captions that identify the appellant and respondent.

(b) The citation

Near the case name (and at the top of the page in a reporter) you will see the official case citation. Citations are important because they explain where to find the case, the level of court deciding the case, and the age of the case.

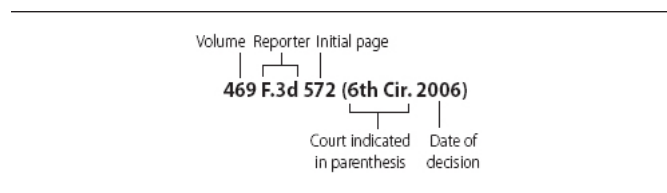
For instance, look at the two citations below in [Figures 3-M](#) and [3-N](#). Each citation tells you the reporter in which the case was published, the volume of the reporter, and the page of the reporter. In parentheses, the citation tells the court that decided the case (if the reporter's title does not already do so) and the year in which the court decided the case.

**Figure 3-M • Citation tells reader where to find the case**



The citation in [Figure 3-M](#) explains that the case is located in volume 128 of *Oregon Reports, Court of Appeals* on page 274. The case was decided by the Oregon Court of Appeals in 1994.

**Figure 3-N • Citation components**



The next citation, in [Figure 3-N](#), indicates that the case is in volume 469 of the *Federal Reporter, Third Series*, at page 572. The case was decided by the United States Court of Appeals for the Sixth Circuit in 2006.

Notice that in a citation the court can be indicated in the reporter or in the parenthetical. If the deciding court is clear from the reporter, the court will not be indicated in the parenthetical. In [Figure 3-M](#), the reporter's abbreviation indicates that the court is the Oregon Court of Appeals, and so no further information about the court is necessary in the parenthetical. If, however, the reporter contains decisions from many courts and the reporter does not indicate the court and its level, the court will be indicated in the parenthetical. In [Figure 3-N](#), the reporter, the *Federal Reporter, Third Series*, contains cases from many federal appellate courts; therefore, the parenthetical specifies that the Sixth Circuit decided the case.

(c) The author of the opinion

At the beginning of the opinion, you can find the author of the opinion, noted by the author's last name, followed by the letter "J."

In federal jurisdictions, a single trial judge for a district court may issue a reported opinion. (In state trial courts, opinions are not published; instead, judges just render decisions on the record.) Appellate courts—whether state or federal—sit in panels of judges, usually three judges for intermediate appellate courts, or five to nine (sometimes more) for the highest appellate courts in the jurisdiction. Judges vote on the outcome of a case, and one judge from the majority writes the opinion.

The letter "J" can stand for either justice or judge, depending on the court—usually "justice" refers to members of the highest court in a jurisdiction and "judge" refers to members of the lower intermediate and trial courts. Occasionally, you will see other letter designations such as "C.J." for Chief Judge or Chief Justice and "S.J." for Special Judge. You will not likely need to use the name of the judge in your memoranda, but opinions written by well-known or prominent jurists may sometimes be more influential. At other times, knowing the writer of the opinion can give you insight into the author's ideology.

## 2. Contextual information

### (a) The facts

Within the first few paragraphs of the opinion, a court will set out the story, or underlying events, of the case. The depth and clarity with which courts describe the facts varies. This section is important to read carefully because most cases are fact-driven, meaning the court's decision hinges on the facts before it. As you read the facts, look for clues as to which facts the court thought were most important. Often, a court will emphasize those facts on which its decision turns. Keep an eye out for the critical facts, those facts that triggered the court's decision. When the case examines more than one legal issue, you will have to determine which facts were critical to each issue addressed. Some attorneys read the fact section once and then again after reading the court's analysis. Doing so will allow you to distinguish critical facts from background facts and match the facts relevant to each issue.

### (b) The procedural history

In either the fact section or an adjacent section, the opinion may explain the legal path the case took after the plaintiff initiated the lawsuit. This information is called "procedural history." When describing the procedural history of a case, a court may explain the claims that were filed; motions that were made before, during, or after the trial; or any appeals that were brought. Within this section, the writing judge may also include information about the arguments each party made in the lower court and the lower court's opinion.

What the parties argued and what the lower court said are not part of a court's holding unless the court indicates that it is adopting those arguments. Be sure to note whether the appellate court is merely describing or actually adopting those arguments.

### (c) The issue or issues

In a single opinion a court may decide many legal questions, which can be raised by either party to the dispute. An issue is one of the legal questions the court is asked to decide. An opinion typically addresses many issues, not all of which will be relevant to your client's problem. Sometimes a court will clearly state the issues it will address and organize its opinion around those issues; other times, you will have to discern the issues the court addressed.

Take for example, Paul Adams's case, discussed in the memo in [Chapter 1, How Attorneys Communicate \(Example 1-A\)](#). If his case were to go to trial, the defendant might ask the court to decide one issue: whether Paul Adams's statement would be admissible against him.

To answer that question, the court has to answer a sub-issue: whether Paul Adams was stopped. If he was not stopped, then his statement was "mere conversation" and is admissible. Accordingly, to decide the party's issue, the court would have to answer two questions: "Was Paul Adams stopped?" and "Is his statement admissible at trial?"

Actual judicial opinions differ from the cases in law school textbooks because of the number of issues each addresses. In most textbooks, the author has edited the case so that the case describes just one legal issue illustrating one point of law. Every other part of the opinion not relevant to that one point has been edited out.

In practice, the cases you read will not be edited; they will contain multiple issues, and some of those issues may be quite long and complex. In unedited cases, you must discern which of the many issues in the opinion will be relevant to your case.

## 3. The court's analysis

### (a) The rule of the case

The rule of the case is the point of law the opinion will represent to future cases.

Sometimes—over time—a case comes to represent a particular point of law. Before that time, however, attorneys may argue about the rule of law that the case represents. Only after attorneys have argued about it, and a subsequent court has stated how we should understand the case, can we be certain about the rule of the case.

Remember, too, that if a case addresses more than one issue—as most cases do—more than one rule can be derived from the case.

### (b) The holding or holdings

A holding of a case is the court's answer to one of the questions presented by one of the parties. Thus, for every legal issue you identify in a case, you should also find a holding.

Although the holding and the rule of the case resemble each other, the holding is tied to the facts of the case before the court. The rule of the case, on the other hand, is a general principle of law the case will represent in the greater body of law.

To make matters a little more complicated, courts often use the terms imprecisely, calling the holding a rule of the case or calling a rule of the case the holding. For example, if the court said, “We rule that Officer James impermissibly stopped the defendant when the officer placed his hand on the defendant’s shoulder and physically prevented him from leaving,” the court’s statement is a holding because it is tied to the particular facts of that case, even though the court used the word “rule.”

On the other hand, the court may write, “We hold that a stop occurs when an officer uses a physical show of authority to keep a person from leaving.” This general statement is really a rule of the case because it is not tied to the facts of the case but, instead, represents the point the case will stand for in the body of law.

Thus, to distinguish between a holding and a rule of the case, pay attention to the facts. A holding is tied to facts; a rule of the case is not.

(c) The reasoning

The reasoning of the case is the analysis the court follows to get from an issue to its holding about that issue. For each issue, the opinion will assess the governing law—whether it comes from statutes, common law, policy concerns, or some combination of those authorities. Then, the court will apply that law to the facts of the case. The reasoning is the “meat” of the opinion, and it requires several careful and thorough readings.

(d) Dicta

Dicta are assertions or statements by the writing judge on points that are not necessary to address an issue presented by a party. A common form of dicta is a hypothetical. Often, a court will assert that had one fact in the case been different, its holding would have been different. Since that fact was not before the court, the court’s statement about that different fact is dictum. Courts have authority to decide only the issues before them; thus, dicta are not a binding part of the opinion. That said, dicta can sometimes be persuasive to a future court, and attorneys may rely on dicta as persuasive but not mandatory authority.

(e) The judgment or disposition

The judgment or disposition appears at the end of the case and states the final action the court is taking on the whole case after considering all of the issues presented to it. For instance, the court may “affirm” or “reverse” the decision of any lower court in whole or in part; it could also “remand” the case back to the trial court for a new determination or further action on all or some of the issues; or, it could “dismiss” or “vacate” the case entirely.

(f) Concurring and dissenting opinions

You will find concurring and dissenting opinions only in appellate court cases decided by a panel of judges. As noted earlier, after the judges vote on the outcome of a case, one judge from the majority will write the opinion. However, other judges may also write to express their views on the analysis or the outcome of the case. If a judge agrees with the outcome but differs in the analytical approach—that is, if the judge differs in how to interpret the law or apply the law to the facts—that judge may write a concurring opinion. If a judge disagrees with the outcome of the case, he or she may write a dissenting opinion explaining why the majority was wrong or what the proper outcome of the case may be.

Concurrences and dissents question the majority’s reasoning, whether in construing the law or applying the law to the facts. These concurrences and dissents can give you insight into the flip side of an argument.

Dissenting opinions are not part of the law and should not be relied on as mandatory authority in future analyses, though they can be used as persuasive authority. Typically, a concurrence is also not a part of the law. However, if the majority needs the vote of the concurring judge to remain in the majority, the concurrence may be considered part of the decided law.

#### **4. Publishing tools to note**

(a) Argument synopsis

In case reporters, immediately after the caption and preliminary information, you will usually see a one-paragraph synopsis of the case. The synopsis describes the most basic issue and underlying facts, the disposition of the case in any lower courts, and the disposition of the case in the present court. While synopses are helpful tools for researching and selecting pertinent cases, they are *not* part of the judicial opinion and are not, therefore, law. These synopses are created by editors of the case reporters. While generally very helpful, a synopsis is not a complete summary of the case and, on occasion, can be inaccurate. You should never cite to a synopsis.

#### (b) Headnotes

In most reported cases, particularly all of the cases reported by the West Publishing Company, after the synopsis you will find headnotes. A headnote is a one-paragraph blurb for each point of law presented in the case. Headnotes act like a table of contents to the case and direct the reader to the portions of the case that address each point of law. Headnotes are also not part of the judicial opinion and cannot be cited. Nor should the content of the headnotes be quoted; instead, go directly to the portion of the opinion to which the headnote refers and use the official opinion.

Even after recognizing each part of an opinion mentioned above, understanding judicial opinions requires you to read critically.

### **B. Reading Judicial Opinions Critically**

Reading critically requires you to question every statement on the page. After critically reading a case, you should be able to answer such questions as

- What issues did the court decide?
- Did the court construe the problem broadly or narrowly?
- How did the court answer the questions presented for review?
- Is the court's analysis logical and supported by primary authority?
- Do the facts and the law support the court's answer?
- Is the analysis flawed?
- Did the court adopt the argument of one of the parties? Whose?
- Did the court actually do what it said it was doing?
- Did the court omit any facts or analysis pertinent to the disposition of the issue? Why did it do so?
- Does this case begin, change, or end a trend established by other cases on the same topic?
- How does this case fit into the body of law?

Legally trained readers tend to answer the above questions routinely, often without consciously realizing they are doing so.

The three critical reading steps explained before will help you answer these questions. By walking through the steps and answering the questions above, you can examine a case and understand it quickly. [Table 3-O](#) summarizes the critical reading steps as applied to an opinion.<sup>7</sup>

#### **Table 3-O • Steps for critical case reading**

Step	Ask these questions
1. Get context for the case.	<ul style="list-style-type: none"> <li>Who are the parties? Individuals or entities? Private parties or the government?</li> <li>Is this a criminal or civil case?</li> <li>What is the jurisdiction? Federal or state?</li> <li>What level of court wrote the opinion? Trial? Intermediate appeals? Highest appeals court?</li> <li>What year was the case decided?</li> </ul>
2. Skim.	<p>Glean the basic information about the case so that you will have a framework of the issues presented and how they were decided. If you get the overall framework of the case in this step, you will be able to read more slowly with greater comprehension and depth of understanding in the next step.</p> <ul style="list-style-type: none"> <li>What is the overall structure of the case? How does the court organize the discussion of the issues in the body of the opinion?</li> <li>What are the key issues?</li> <li>What is the basic, underlying factual dispute?</li> <li>What are the key facts? (Start to get a visual image of the factual story.)</li> <li>What is the procedural path the case has taken thus far?</li> <li>What did the lower courts do?</li> <li>What was the disposition of the case?</li> <li>Look at the structure of the opinion again. Try skimming the first sentence of every paragraph. Do these sentences give you an outline of the court's reasoning?</li> </ul>
3. Read the case closely and question it.	<p>Now that you have a good framework of what the case does and says, you are ready to dig into the meat of the case. For each issue presented to the court, answer the questions posed below.</p> <ul style="list-style-type: none"> <li>What was the governing law? Is it statutory? Common law? A combination of both?</li> <li>What facts did the court rely on in making its decision?</li> <li>Does the issue turn on particular facts, or is the court addressing a pure question of law—that is, is the court merely explaining what the law is?</li> <li>Whose argument does the court appear to be following? A party's? The lower court's? Its own?</li> <li>Does the court's interpretation of the law make sense?</li> <li>Does the court's application of the law to the facts make sense?</li> <li>Is the court's argument flawed? On what specific points?</li> <li>What is the rule of the case? How will it apply to future cases?</li> <li>Does the court include policy reasons for its decision?</li> <li>Any concurring opinions? On what points do the judges agree? Disagree?</li> <li>Any dissenting opinions? What does the dissenting judge object to in the majority opinion? Does the dissent's argument make more sense?</li> <li>How does this case fit with other cases or governing laws on the topic?</li> <li>What new words should you look up?</li> </ul>

This list of questions may seem very long. Even so, most expert legal readers typically think about and answer these questions as they go through a legal document. Novice legal readers tend to read superficially, grasping the big picture, but not the key details that will be necessary for their analysis.

With practice, you will also start asking, and more importantly answering, these questions as you read cases. Further, the time it takes for you to read, comprehend, and analyze a case will dramatically decrease as well. An expert legal reader does not spend more time reading cases than a novice reader; in fact, the expert legal reader usually spends less time. The critical distinction between the expert and novice legal reader is the depth of comprehension each takes away from the case. Note the differences between expert and novice legal reading in [Table 3-P](#).

**Table 3-P • The differences between expert and novice legal readers of judicial opinions\***

Expert legal readers tend to:	Novice legal readers tend to:
<ul style="list-style-type: none"> <li>• Read parts of the opinion at varying speeds, reading more slowly during key parts, more quickly during parts not relevant to the issue.</li> <li>• Read facts slowly; read the rest of the case at twice that speed.</li> </ul>	<ul style="list-style-type: none"> <li>• Read quickly without much comprehension.</li> <li>• Read each portion of the opinion at an equal rate.</li> </ul>
<ul style="list-style-type: none"> <li>• Pay attention to the context of the case before they start reading for detail.</li> <li>• Note the opinion's length and organization before they read for details.</li> </ul>	<ul style="list-style-type: none"> <li>• Ignore contextual details such as the level of court, date, characteristics of the parties.</li> </ul>
<ul style="list-style-type: none"> <li>• Look carefully at the facts of the case, creating a visual picture of the parties and what happened.</li> </ul>	<ul style="list-style-type: none"> <li>• Read the facts superficially, without close attention.</li> </ul>
<ul style="list-style-type: none"> <li>• Note what the court actually <i>did</i> versus what the court said it was doing.</li> <li>• Notice whose argument prevailed and why that argument was persuasive to the court.</li> <li>• Question the reasoning and application of the law, noting whether the court formed a solid argument based on the law.</li> <li>• Note what the court omitted.</li> </ul>	<ul style="list-style-type: none"> <li>• Accept the rationale and factual interpretation of the court without question.</li> <li>• Fail to notice whose story the court was accepting.</li> <li>• Look for only the outcome of the case.</li> </ul>
<ul style="list-style-type: none"> <li>• Think about how the rule from the case will affect later cases.</li> </ul>	<ul style="list-style-type: none"> <li>• Fail to notice what the court omitted.</li> <li>• Fail to think about the case's place in the body of law.</li> </ul>

\* This chart is derived from the works of Peter Dewitz, *supra* note 7, at 230-31, and Elizabeth Fajans and Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 Cornell L. Rev. 163, 179-81 (Jan. 1993); see Lundeberg, *supra* note 3, at 412-17.

By learning these critical reading steps, you will become an expert legal reader quickly and, just as importantly, you will begin to build your legal analysis. Building a legal analysis depends not only on effective reading but also on effective organization, which brings us to the next phase of the legal writing process: finding your legal argument and organizing what you have read.

## Practice Points



- Reading has two aspects: speed and comprehension. Employing critical reading tools can help a lawyer excel in both aspects.
- Whether reading a statute or a judicial opinion, use these critical reading steps:
  1. Get context,
  2. Skim the text, and
  3. Read closely and question the text.

<sup>1</sup> Debra Moss Curtis and Judith R. Karp, *In a Case, In a Book, They Will Not Take a Second Look: Critical Reading in the Legal Writing Classroom*, 41 Willamette L. Rev. 293, 296 (Spr. 2005).

<sup>2</sup> *Id.* at 299.

<sup>3</sup> These steps are adapted from Mary A. Lundeberg, *Metacognitive Aspects of Reading Comprehension: Studying Understanding in Legal Case Analysis*, 22 Reading Res. Q. 407, 421, 427-29, Appendix 1 (1987).

<sup>4</sup> A few states deviate from the patterns described in the text. In Illinois, the statutes are broken down into “chapters,” then “acts,” and then “sections.” In Maryland, Minnesota, and Wisconsin the statutory compilations have only two divisions, in which “Titles” or “Chapters” are divided into “sections.” In every state, however, “sections” are the fundamental unit of each state’s statutory scheme.

<sup>5</sup> The explanation in this paragraph of how a statute is organized is adopted from Christina Kunz, et al., *The Process of Legal Research* 192 (Aspen Pub. 2004).

<sup>6</sup> If you are using a print edition, be sure to look at the pocket parts (the paper supplement in the back of the hard copy book) for the most up-to-date version of the statute and most recent historical notes.

<sup>7</sup> These steps are adapted from Mary A. Lundeberg, *supra* note 3, at 428-29, and Appendix 1; Peter Dewitz, *Legal Education: A Problem of Learning From Text*, 23 N.Y.U. Rev. L. & Soc. Change 225, 240 (1997).

## Chapter 4

### Finding Your Argument

#### I. Determine the Governing Rule

A. A Statute as the Governing Rule

B. Common Law as the Governing Rule

C. A Synthesized Rule as the Governing Rule

#### II. Inventory the Governing Rule's Working Parts

A. Elements

B. Factors

C. Red Flag Words

D. Tests

#### III. Think Like a Lawyer: See the Governing Rule as Individual Legal Arguments

#### IV. Identify Individual Legal Arguments

A. Example 1: The Elements in Burglary

B. Example 2: The Elements in Adverse Possession

By now, you are in the middle of your second day at work. Yesterday, after you spoke with the attorney about the client's legal question, you went back to your office and reviewed the client's file and the notes from your conversation with the senior attorney. You then began to research. As you researched, you read through legal authorities to determine whether they seemed relevant to the client's question. In this early stage, you are finding your legal argument.

Getting from a client's legal question to a cogent answer requires three initial steps:

- 1. Determine the rule that will govern your client's legal question.**
- 2. Inventory and understand the governing rule's working parts.**
- 3. Break the governing rule into individual legal arguments.**

Those three steps will allow you to identify the individual legal arguments that, when taken together, will answer your client's legal question. Thus, by breaking down the governing rule you will find your argument.



## **I. Determine the Governing Rule**

To answer your client's legal question you must first determine the rule that governs the question. A "rule" sets a standard by telling people what they must or can do, what they must not or should not do, or what they are entitled to do under certain conditions. Rules also describe the consequences of breaking a rule.

The "governing rule" sets the standard in your client's case. It will control the answer to your client's question and create a structure around which your argument should be organized. Think of the governing rule as the backbone of your discussion. A human backbone creates the structural foundation for the body, giving the muscles, tendons, and ligaments a rigid structure on which to hold. Likewise, the governing rule creates the structural foundation for your legal argument; every piece of your argument will be connected to that governing rule.

Typically, you will find the governing rule either in a statute or in the common law, or maybe from a combination of both. Because case law is subordinate to the statute it interprets, if you do not know whether a client's question is governed by statute or by common law, begin by looking for a statute.

### **A. A Statute as the Governing Rule**

If a statute governs your client's legal problem, identifying the governing rule is rather straightforward. For example, suppose your client has been charged with burglary. Generally, the question of whether a person has committed a burglary is controlled by statute. [Example 4-A](#) describes a typical burglary statute. This statute is the governing rule that would control whether your client will be found guilty of burglary.

#### **Example 4-A • A governing rule from a typical burglary statute**

A person commits burglary if that person knowingly and without authority enters the dwelling place of another with intent to commit therein a felony or theft.

### **B. Common Law as the Governing Rule**

Sometimes, however, no statute governs the legal question. In that case, the governing rule will come from common law.

For example, California allows people to seek compensation for emotional distress they suffered after witnessing an injury to a family member. In California, courts have defined a governing rule for such claims. The court's description of the governing rule is provided in [Example 4-B](#).

#### **Example 4-B • Common law sets forth the governing rule**

"[A] plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, but only if, said plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress—a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances."

*Thing v. La Chusa*, 771 P.2d 814, 829-30 (Cal. 1989) (footnotes omitted).

### **C. A Synthesized Rule as the Governing Rule**

Sometimes, you may have to synthesize a governing rule. To "synthesize" means to combine or blend parts to create a whole. When you synthesize a governing rule, you combine principles from more than one authority to set forth the governing rule that controls your client's legal question.

For example, in many jurisdictions the governing rule that controls an employment discrimination claim would draw on both a statute and case law. Ohio is one such jurisdiction. An Ohio statute prohibits age-based employment discrimination ([Example 4-C](#)).

#### **Example 4-C • Ohio's anti-discrimination in employment statute**



The shaded text will become a part of the synthesized rule in [Example 4-E](#).

### **Ohio Rev. Code §4112.02**

It shall be an unlawful discriminatory practice: (A) For any employer, because of the race, color, religion, sex, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

Ohio case law, however, has explained the steps an employee must take to prove discrimination under the statute ([Example 4-D](#)).

### **Example 4-D • Case law explains how to implement statute**

The shaded text will become a part of the synthesized rule in [Example 4-E](#).

“In cases brought pursuant to R.C. 4112.02 for ‘disparate treatment,’ Ohio courts have adopted the three-step formula set forth by the United States Supreme Court ... according to which the plaintiff must first prove by a preponderance of the evidence a prima facie case of disparate treatment. That done, the burden shifts to the defendant to provide a legal justification for the differentiation. The plaintiff must then be given the opportunity to prove that the justification was merely pretextual.”

*Myers v. Goodwill Indus. of Akron, Inc.*, 701 N.E.2d 738, 743 (Ohio Ct. App. 1997).

If you were working on a memorandum assessing whether a client had been subjected to age-based employment discrimination, you might draw on both the statute and case law to state a governing rule like the one in [Example 4-E](#).

### **Example 4-E • Governing rule combines language of statute and case law**

The governing rule draws on statutory language.

Whether a court will hold that a discharge is an “unlawful discriminatory practice” based on age depends on a three-step analysis. *See* Ohio Rev. Code Ann. §4112.02 (2005); *Myers v. Goodwill Indus. of Akron, Inc.*, 701 N.E.2d 738, 743 (Ohio Ct. App. 1997). First, the employee must establish a prima facie case of disparate treatment. *Myers*, 701 N.E.2d at 743. If the employee succeeds, then the burden shifts to the employer, who must provide a legal justification for the disparate treatment. *Id.* If the employer does present a legal justification, then the burden shifts back to the employee to prove that the reason was a pretext. *Id.*

The remainder of the governing rule draws on language from case law.

## II. Inventory the Governing Rule's Working Parts

Whether the governing rule is derived from a statute, common law, or both, it will have the same working parts: elements, factors, and red flag words. These parts, first introduced in [Chapter 3, Reading for Comprehension](#), determine how the governing rule will operate in your client's case and establish a structure for your analysis. So, the next step in finding your argument is to review the governing rule's working parts to determine how the rule functions.

### A. Elements

An element is a condition that *must* be proved to establish whether a standard is met. For example, the test for whether a person has committed a burglary is a test composed of elements. Each element must be satisfied for a person to have committed a burglary. If any one element is not proved, the person has not committed burglary.

### B. Factors

A factor is different from an element. A factor is a condition that is weighed against another condition. Not all factors must be met for the standard to weigh in favor of one party; instead, the factors will be judged on their individual or cumulative strength.

An example of a rule composed of factors is the standard for child custody. To determine who will be awarded custody, a court considers "the best interest of the child." To determine the best interest of the child, the court then considers multiple factors, including the age of the child, the child's emotional ties with each parent, established living patterns, and the child's preference. No one factor must exist to award custody to one parent or another. Rather, the court considers the *degree* to which each factor is present and weighs the strength of the factors on one side against the strength of the factors on the other side to reach its conclusion.

### C. Red Flag Words

Red flag words, which we first introduced in [Chapter 3, Reading for Comprehension](#), are also known as "special operative words." These words denote action, inaction, limitation, causation, entitlement, or consequence. You will come across these terms quite frequently when reading and interpreting statutes and common law tests, and it is helpful to know how the words are most commonly used so that you can properly understand the rule. [Table 4-F](#) (which was included in [Chapter 3](#) as [Table 3-E](#)) lists the red flag words that you will see most frequently.

**Table 4-F • Red flag words**

• And	Requires all elements that it joins to be present for a standard to be met, or requires all factors that it joins to be considered.
• Or	Only one of the elements it joins must be present for a standard to be met, or only one of the factors that it joins must be considered.
• Either	
• Unless	Creates an exception to the standard.
• Except	
• If ... then	
• Shall *	Mandates conduct.
• Must	
• Shall not	Prohibits conduct.
• May not	
• Must not	
• Provided that **	Creates a condition, an exception, or adds an additional requirement.

\* Although "shall" is typically interpreted as mandatory language, courts sometimes construe it as permissive. See Bryan A. Garner, *Legal Writing in Plain English: A Text with Exercises* 105-06 (Univ. Chic. Press 2001).

\*\* See *id.* at 107-08 (discussing the multiple meanings of "provided that" and recommending that drafters avoid the phrase).

### D. Tests

Elements, factors, and special operative words are the component parts of a governing rule. They combine to form different kinds of tests that courts use to determine whether the standard in the governing rule has been met.

Many kinds of tests exist, and attorneys and judges may use different names for the tests. The important thing is to recognize what kind of test is being used, how it affects the way the governing rule operates, and whether the test dictates the organizational structure of your analysis. Although the list below is not exhaustive, it names the most common tests you will see.

### **1. Elemental analysis**

First, evaluating a rule composed of elements may be called an elemental analysis; that analysis will require each element to be met before the standard is satisfied. In an elemental analysis, you will march through an analysis of each element, usually following the same order in which the element was presented in the governing rule.

### **2. Balancing test**

A second kind of test, a balancing test, is used to evaluate a rule composed of factors. The test is so named because the court will balance competing factors against each other to reach its conclusion.

In a balancing test, a party does not need to satisfy each factor for the court to rule in that party's favor. "The best interest of the child" example, described earlier, is a good example. Although several factors may weigh in favor of one parent, if the factor of the child's emotional ties strongly weighs in favor of the other parent, that parent may get custody of the child. So, even if a parent has only one factor weighing in that parent's favor, if the court believes that factor carries enough weight, that parent wins.

When imagining how a balancing test works, think of the traditional two-pan scale, like the scale of justice. For a party to win under a balancing test, the scale can weigh greatly in his favor or slightly in his favor. The amount of weight placed on either side of the scale depends on the court's assessment of how all the factors balance both individually and cumulatively.

In a balancing test, you will typically try to organize your analysis around the individual factors that make up the balancing test. Organizing around factors, though, is sometimes challenging. Because courts weigh factors against each other, the factors often become intertwined in a court's analysis. Thus, although you should try to organize your analysis around the individual factors, if the prior case law does not allow you to separate out the factors you may have to examine the factors as a group.

Moreover, when the test is a balancing test, predicting an outcome in a future case may be challenging. Because balancing tests weigh a multitude of factors, the holdings that result are often case-specific. That is to say, a change in a single fact may tip the scales in the opposite way.

### **3. Totality of the circumstances test**

Third, courts sometimes employ a "totality of the circumstances" test. When a court looks at the totality of the circumstances, it reviews all relevant facts together to determine whether the governing rule's standard is met. A totality of the circumstances test allows the court to look at a broad spectrum of facts and weigh them; however, unlike a pure factor balancing test, the court does not have a finite list of factors to consider.<sup>1</sup> Rather, the court can consider any relevant fact.

### **4. Prong test**

Finally, in a prong test, a court determines whether a standard is met by using a multi-part inquiry. Each inquiry is one prong of the test, and the court evaluates each prong in turn.

Be aware that the term "prong test" can be applied to many kinds of analyses. The name is sometimes applied to basic elemental analyses or to balancing tests. Thus, a prong can be an element, and each prong represents a requirement that must be met. Or, a prong can be a factor that must be balanced with factors in other prongs. The term can also be used when the court presents the test as a series of questions.

Ohio's test for establishing a discriminatory discharge ([Example 4-E](#), above) is an example of a prong test. It has three prongs. The first prong requires an employee to establish a prima facie case of disparate treatment. If the employee does so, the second prong requires the employer to justify the disparate treatment. Finally, if the employer provides a justification, the employee must prove under the third prong that the justification is pretext for a discriminatory purpose.

If the governing rule in your client's question involves a prong test, such as Ohio's test for a discriminatory discharge, your analysis will be structured around those prongs, and you will evaluate each prong in turn, just as a court would.

When taking inventory of a rule's working parts, understanding the test used can show you how the rule functions and how to structure the analysis of the governing rule in your memo.

### **III. Think Like a Lawyer: See the Governing Rule as Individual Legal Arguments**

After determining the governing rule and inventorying its working parts, the next step is to break the rule down into individual legal arguments. Breaking the rule down into individual arguments is an essential step in “thinking like a lawyer.” To explain why, back up for a moment and remember some basic information about rules.

As discussed above, a rule tells people what they must do, what they cannot do, or what they are entitled to do. In all cases, however, people must do something, must not do something, or are entitled to do something only under certain conditions. (Those conditions are the elements or factors of the rule.)

Attorneys organize their legal discussions around these conditions. To discuss a legal question, attorneys examine each condition—whether the condition is an element or factor—individually. Then, for each condition in the rule, the attorney structures an argument that tests for the presence of that condition in the client’s case. Only after determining whether each condition is present (or the extent to which it is present) will an attorney decide whether the standard in the governing rule has been met. The important point is that each condition in the governing rule becomes the subject of a single legal argument.

#### **Sidebar**

Just as an apple cannot be eaten in one bite, legal questions cannot be addressed all at one time.

The senior attorney who asked you to “get back to her with your analysis” will expect you to examine each element or factor in the governing rule and develop a separate legal argument for each. Her expectation, which all attorneys share, will affect how you think about, organize, and write about your client’s legal problem.

#### IV. Identify Individual Legal Arguments

To identify the individual legal arguments, you will review the governing rule to determine the conditions—the elements and factors—that must exist for the standard to be met. Some attorneys break down the governing rule into individual arguments by thinking of it as an “if ... then” statement. If conditions A, B, and C exist, then the standard in the rule is met. Identifying the conditions that must be met is sometimes a little trickier than it might seem. At the start, it can be difficult to determine whether individual ideas within the governing rule work together or function independently. Here are two examples.

##### A. Example 1: The Elements in Burglary

Let’s look first at the rule that governs whether a person would be found guilty of burglary. The elements you might initially identify in the burglary statute are shaded ([Example 4-G](#)).

##### Example 4-G • Identifying the elements in a governing rule for burglary

A person commits burglary if that person knowingly and without authority enters the dwelling place of another with intent to commit therein a felony or theft.

However, as you begin to work with these elements you might adjust your initial list. “Knowingly” and “without authority” do not stand alone. Each modifies and is connected to “enters.” Similarly, “therein” describes where the person has to intend to commit a felony or theft. Finally, although “person” is a required element, nobody is likely to argue about whether your client is a person, so that element should be eliminated from your list of conditions that will have to be examined.

Thus, you might divide the governing rule into the following elements:

- Enters
  - Knowingly **and**
  - Without authority
- The dwelling place of another
- With intent to commit therein a
  - Felony **or**
  - Theft

These elements would then shape how you think about, organize, and write about your client’s legal problem. For example, you would ask the following questions:

- What qualifies as an **entry**?
- What does it mean to **knowingly** enter?
- What does it mean to enter **without authority**?
- What qualifies as a **dwelling place of another**?
- What facts suggest that a person **intends to commit a felony or theft** therein?

As you begin to organize your ideas, your research regarding each of these elements would be transformed into distinct legal arguments. Your memo would address the following questions:

- Can a prosecutor prove that my client **entered**?
- Can a prosecutor prove my client **knowingly** entered the dwelling of another?
- Can a prosecutor prove my client entered **without authority**?
- Can a prosecutor prove that it was a **dwelling of another** into which my client entered or remained?
- Can a prosecutor prove that my client did so with the **intent to commit a felony or theft** in that other person’s dwelling?

## B. Example 2: The Elements in Adverse Possession

Additional reading may also affect your list of elements. Take for example, the rule establishing that a person can claim title to land if that person has used the land as an owner would for 10 years. One court's explanation of the rule is provided in [Example 4-H](#), with seven elements numbered.

### Example 4-H • Identifying elements in the governing rule for adverse possession

“To succeed on their adverse possession claim, defendants must establish by clear and convincing evidence, that the use of the property was [1] actual, [2] open, [3] notorious, [4] exclusive, [5] continuous, and [6] hostile for a [7] 10-year period.” *Hoffman v. Freeman Land and Timber, LLC*, 994 P.2d 106, 109-10 (Or. 1999).

An attorney would assume that gaining title to the land would depend on establishing those seven elements. Upon further reading, however, the attorney would see that all the courts examine “open and notorious” as one condition.

The attorney would, therefore, revise his understanding of the number of conditions that need to be met to prove adverse possession. When he writes his memorandum to the senior attorney, the organization would follow this revised understanding of how the elements fit together.

Remember, the governing rule is the backbone of your legal argument. Just as the human backbone is composed of multiple vertebrae, a complete legal discussion is usually composed of multiple legal arguments. Each element or factor in the governing rule is the source of an individual legal argument, which, similar to an individual vertebra, must support the body of the discussion.

### Practice Points



- Before you can write about your client's legal issue, you must find your argument.
- The first step to finding your argument is to determine the governing rule that controls your client's legal question.
- The governing rule can come from a statute, case law, or any combination of sources. The rule may not be explicit, and you may have to synthesize several sources to determine the current governing rule.
- Once you have found the governing rule, take inventory of its working parts. Notice whether the standard uses elements or factors and what kind of test they form.
- A governing rule is the backbone of your analysis. It indicates the structure your argument will take. Typically, your analysis will follow the structure and order established in the governing rule. Each smaller argument, whether an element or factor, will need to be analyzed in turn.

<sup>1</sup> David Romantz & Kathleen Vinson, *Legal Analysis: The Fundamental Skill* 25-26 (Carolina Acad. Press 1998).

## Chapter 5

# Organizing Your Legal Authority

### I. Chart the Cases

#### A. Chart the Governing Rule

#### B. Chart Individual Elements or Factors

### II. Outlining

#### A. Why Outline?

#### B. How to Outline

### III. Give Your Audience What It Needs

After determining the rule that governs your client's question and identifying its conditions, you will then have to organize the relevant legal authorities around those conditions. Although it is tempting at this stage to just jump into writing, that approach is not efficient. Since you will discuss your client's legal question element by element or factor by factor, organizing your research in the same way is an efficient way to evaluate each distinct piece of your discussion.

Organizing your research around elements or factors helps you to synthesize the law. As we have explained before, "synthesizing" means combining or blending parts to create a whole. For each element or factor, you will need to synthesize a variety of authorities into a seamless explanation of the law about that element or factor. Typically, a single case cannot tell you all that you will need to know about an element or factor. Each case may put a slightly different spin on the legal rules relevant to that condition. And each case will certainly have a different fact pattern from previous cases. In fact, much of an attorney's legal analysis about an element or factor comes from synthesizing the law about that element or factor.

To synthesize the law, lawyers look at a series of legal authorities and ask questions:

- What is the law that governs this condition and where does it come from? (A statute? cases? both?)
- How are the cases that address this condition alike or different factually?
- How are the cases addressing this condition alike or different in the courts' explanation or application of the law?
- Are the courts establishing a trend with their decisions regarding this condition?

Try not to read any one authority in isolation. Instead, read the authorities asking how all the authorities fit together.



## I. Chart the Cases

Some legal writers find that organizing cases on a chart helps them understand the relationships among the cases and discern how authorities fit together. Charting cases can help you notice the similarities among and differences between cases and see patterns emerging in the law. Seeing patterns emerge will allow you to more accurately predict how those cases will affect the outcome of your issue. Further, because your research may yield more cases than you can include in your analysis, charting can help you select the best cases to use in your memo.

Case charting is a tool you should use during the research process to help you critically think about the legal authorities you are gathering. As you research, write the key points on your chart. Notice the emerging patterns, and notice the gaps in the law your research has not covered. Noting these points as you go along will help focus your research and simultaneously make you more efficient.

[Examples 5-A](#) and [5-B](#) show two different charts. Each of the examples shows information from a variety of cases and allows you to synthesize and evaluate the law element by element or factor by factor.

### A. Chart the Governing Rule

One way to chart cases is to use the governing rule as a guide. By listing the elements in the governing rule along one axis and the relevant authorities along the other, the chart will show you how each case addresses each element in the governing rule.

[Example 5-A](#) shows what that chart may look like if the question is whether a client has committed a burglary. As we discussed in [Chapter 4](#), *Finding Your Argument*, the rule governing the crime of burglary can be broken down into the following elements:

- Enters
  - Knowingly **and**
  - Without authority
- The dwelling place of another
- With intent to a commit therein a
  - Felony **or**
  - Theft

Imagine that your client was arrested and charged with burglary after he crept into another person's tent at an adventure camp outing and took his friend's camera. Your client wanted to delete embarrassing photographs from the camera and prevent the other person from taking more photographs. You are researching whether your client's conduct meets the elements of the burglary statute.

The case chart reflects each element at issue in your client's case and allows you to see how prior cases have addressed those elements.

This chart has several important components.

#### 1. Citations

The burglary chart in [Example 5-A](#) provides citations for each legal authority that will be analyzed. The citation information includes the court that decided the case and the year in which the case was decided, allowing you to assess the weight of the authority.

#### 2. The parties

Next, the chart in [Example 5-A](#) lists the parties in the case and, importantly, their relationship to each other. Whenever possible, in addition to identifying a party as the plaintiff or defendant, you should also identify their "player" status—that is, identify the role the person played in the underlying factual events. In a criminal case, you could identify the perpetrator as "defendant" since he is the one accused, as the chart in [Example 5-A](#) did. In a civil case, however, identifying the parties only as "plaintiff" or "defendant" can be too vague. Instead, identify the person by the role that person plays. For instance, in a premises liability case, you might identify the parties as "landlord" and "tenant," and in an employment discrimination case, you might identify the parties as "employer" and "employee."

### 3. Legal arguments

The remaining columns are devoted to the various elements or factors that are relevant to the applicable governing rule. These columns will help you identify the factual similarities and differences that led to the varying results in the cases, which in turn will help you make an informed prediction as to how the governing rule will apply to your client's fact pattern.

Understand, though, that this chart examines several elements. When you outline your written analysis, you will write about one element at a time.

### 4. Comparison to client's case

Finally, many legal writers will include a column for the facts in their client's case. In that column, you can note how your client's facts are like or unlike the precedential case. Considering the similarities and differences between your client's case and the precedential case(s) when you are first thinking about a case can be a great time saver when you begin outlining and writing.

#### Example 5-A • Chart 1: Burglary

CASE NAME	FACTS	KNOWINGLY	ENTERS WITH- OUT AUTHORITY	DWELLING	INTENT	HOLDING	LIKE OR UNLIKE OUR CASE
<i>State v. Smith</i> , 201 N.E.2d 673 (Ohio Ct. App. 1973).	Two unarmed teenagers entered the home of one of their friends.	Yes. Knew it was dwelling of another: they knew it was the friend's house.	No authority to enter.	Yes, "a dwelling of another." Residential home was family's permanent home.	No. Intent to commit crime therein not established. Boys were trying to play practical joke by putting friend's prize pet boa in his book bag.	No burglary. Intent element not met. Although other elements were met, boys did not enter tent with intent to commit a felony or theft.	Dwelling was a tent. Client knew it was tent of another. Client wanted to take camera to delete photographs and prevent friend from taking additional photos.
<i>State v. Jones</i> , 518 N.E.2d 333 (Ohio 1985).	Armed men entered vacation home of their acquaintances.	Yes. Knew it was dwelling of another: they knew home belonged to acquaintances and they often stayed there for long periods of time.	No authority to enter. Although they often stayed there, on this occasion acquaintances had not given permission.	Yes, "a dwelling of another." Vacation home. Although couple not staying there at time of alleged crime, they often stayed there for as long as three months at a time. Home was fully furnished.	Yes. Intent to commit a crime therein. Intruder was armed; evidence showed he had stalked out the house to determine specific items to take.	Burglary. Even though victims were not currently in vacation home, D knew the victims frequented the home, often for long periods of time, and D planned to take valuables.	Arguably, tent is like a vacation home. Victim frequently used tent for days at a time. Accused had no authority to enter. Is tent a dwelling? D knew what specific item he wanted to take and waited until friend left to enter.
<i>State v. Green</i> , 988 N.E.2d 901 (Ohio Ct. App. 2000).	Unarmed man entered home; did not know whose home it was.	No. Did not know it was dwelling of another: he thought home was abandoned (no one appeared to have lived there for 8 months).	No authority to enter.	Yes, "a dwelling of another." Residential dwelling but unoccupied for 8 months.	No. Intent to commit a crime therein. Man not armed. Just wanted a place to sleep for the night. Thought items that he took had been abandoned.	No burglary. Even though another person owned the home, no one had lived there in 8 months, and D thought it was abandoned. D also wanted to sleep, not commit theft or felony.	Green case is least like client's case. Green def. thought house was abandoned, so no burglary. Here, accused knew that someone was staying in tent and wanted to take item from him.

### B. Chart Individual Elements or Factors

A second way to chart cases is to examine one legal point at a time, whether an element or factor. [Chart 5-B](#) shows how you might construct this second kind of chart.

Imagine that your clients, the Neros, have for over twenty years believed that a piece of land belonged to them. As a result, during all of that time, they gardened and maintained it. They have recently learned that they never had legal title to it. You are researching whether they can gain title to it through a claim for adverse possession. To win, the Neros will have to establish all five elements in the common law claim for adverse possession.

[Chart 5-B](#) shows how you might organize the authorities relevant to the first element, "actual possession." Because a claim for adverse possession must address five elements, the actual possession chart would be the first of five charts you would create.

#### 1. Citation

Like the burglary chart in [Example 5-A](#), the actual possession chart also identifies the citation for each authority.

## 2. Rules

Next, the actual possession chart in [Example 5-B](#) provides a column for rules relevant to the element. Typically, a court will describe the rules it used to reach a determination about each element or factor, and those rules are listed in the second column.

You can review the column to determine whether courts are explaining the rules relevant to an element or factor in a consistent way. Thanks to stare decisis, courts generally explain the law in a consistent way, as they do in the actual possession chart in [Example 5-B](#). Sometimes, however, differences exist. Charting allows you to see and reconcile those differences before you begin writing.

## 3. Facts

This column will allow you to identify the facts in prior cases that were relevant to the element. Although at the outset of its decision a court explains the entire story of the case, when the court analyzes an individual element or factor it draws on only some of those facts. This column allows you to see the particular facts that caused a court to reach its conclusion about an element.

### Example 5-B • Chart 2: Actual possession (one element in an adverse possession claim)

Case name	RULES about Actual Possession	FACTS about Actual Possession	Court's HOLDING about Actual Possession	Additional REASONING about Actual Possession
<i>Davis v. Parke</i> , 898 P.2d 804 (Or. Ct. App. 1995).	Requires "occupation or use of the land that would be made by an owner of the same type of land, taking into account the uses for which the land is suitable," p. 805.	Claimants bought cattle and turned it loose on the property. Fence was in some disrepair, but plaintiff had repaired it. Fence intended to keep cattle on disputed property. pp. 805-06. Claimants grazed cattle on their actual property and the disputed property. p. 806.	Yes. Actual Possession because plaintiffs maintained the fence. pp. 806-07.	Claimants "used the disputed property the same way they used their adjoining land" p. 806.  Claimants "maintained a fence to keep cattle in, although they were not always successful in keeping their cattle inside it" p. 806.
<i>Hoffman v. Freeman</i> , 994 P.2d 106 (Or. Ct. 1999).	Claimant must establish "a use of the land that would be made by an owner of the same type of land, taking into account the uses for which the land is suited" p. 110.	Claimants used disputed property for occasional grazing of cattle. Testimony at trial was "undisputed" that land unsuitable for most other uses. pp. 110-11.	Yes. Actual Possession because cattle occasionally grazed on land. pp. 110-11.	Occasional pasturing or grazing of livestock may be sufficient to prove actual use. p. 110. The lot in dispute was unsuitable for other purposes and grazing is one use an owner would make of the land. pp. 110-11.
<i>Mid-Valley v. Engelson</i> , 13 P.3d 118 (Or. Ct. App. 2000).	[Actual possession not addressed. Claim failed on "Hostility" element.]			
<i>Slak v. Porter</i> , 875 P.2d 515 (Or. Ct. App. 1994).	Requires use that an owner would make of it taking into account use for which land is suited. p. 518.	Claimants erected a fence and planted trees, shrubs and other vegetation. pp. 518-19.	Yes. Actual Possession because erected a fence and planted trees, shrubs, and other vegetation. p. 519.	Erecting a fence and planting is the type of use an owner would make of this property. p. 519.
<i>Zambrotto v. Superior</i> , 4 P.3d 62 (Or. Ct. App. 2000).	Requires "use of the land that would be made by an owner of the same type of land, taking into account the uses for which the land is suited" p. 65.  "The requirement of 'actual' use is a qualitative one, determined by reference to the type of use that would be made by an owner" p. 65.	Property was rural, mostly forested. Claimants used land to hike and hunt for rattlesnakes. Re-paired fence that ran along southern boundary. p. 65.	Yes. Actual Possession. "Given the nature of the land, we conclude that hiking, rattlesnake hunting, and the like, constitute actual use." p. 65.	"[T]here is evidence of actual use, not much use, to be sure, but actual use nonetheless" p. 65.

By reviewing this column, you can determine whether any commonalities exist in the facts that will lead a court to reach a conclusion about a given element or factor.

## 4. Holding

The holding column allows you to see the holding the court reached after it considered the rules and facts.

Although both the burglary and actual possession charts in [Examples 5-A](#) and [5-B](#) have columns labeled "holding," the columns describe different kinds of holdings. In the burglary chart, [Example 5-A](#), the "holding" is a court's holding regarding the entire legal question of

burglary. By contrast, the holding in the actual possession chart, [Example 5-B](#), is the court's holding with respect to a single element.

## 5. Reasoning

The final column in the actual possession chart, [Example 5-B](#), describes any additional reasoning a court provided to explain how it moved from the specific facts in a case to its holding about the element. When this column is complete, you can review it for any commonalities or themes that exist in the courts' reasoning.

## 6. Comparison to client's case

Although not shown in [Example 5-B](#), you can add a final column that would list the facts from your client's case relevant to each element or factor. Doing so will allow you to see relevant similarities or differences between your client's case and the prior case described in that row.



Attorneys choose different ways to organize information as they research and prepare to write. You should try different organizational methods to find the one that works well for you. The goal, however, remains the same: to see the themes in the law element by element or factor by factor. By seeing these themes and understanding how the cases fit together at this stage of the writing process, you will more accurately predict how those cases will affect your issue, more easily select the best cases to use in your memo, and get through your writing project more efficiently.

## II. Outlining

After charting, you are ready to outline. Outlining is an important step because it requires you to evaluate your discussion of your client's legal question before you begin writing. Most experienced legal writers cannot draft a logical or effective argument without first developing a clear outline of the issues and the authorities they need to address.

### A. Why Outline?

Outlining has a different purpose than charting. Charting allows you to see the legal authorities that are *possibly* relevant to each part of your discussion. By contrast, an outline does not include all the possibly relevant legal authorities. Rather, it includes the legal authorities that seem most relevant to reaching conclusions in your client's case at this point in your thinking. When outlining you will organize those authorities around different points of law and consider how those authorities will apply to the facts in your client's case. This process allows you to consider the depth of discussion necessary for each point of law. It also allows you to think through the development of the answer to your client's legal question.

If you have never used an outline before, consider using one now to think through your legal discussion and to guide you as you write. Remember that legal writing is likely a different kind of writing than you have done before. Legal writing is structured writing. An outline can help you develop the structured writing that other attorneys will expect to see in your work product.

Finally, if you think that skipping outlining will save you time, remember that if you have not thought about an effective organization and the specific legal authorities you will use before you begin drafting, you will still have to do so as you write. Delaying your thinking may mean that you waste time laboring over specific language that you ultimately do not need.

### B. How to Outline

An outline should be a flexible tool. You should not feel constrained to use the traditional Roman numeral outline, shown in [Example 5-C](#). No one but you will ever see or use the outlines you create. With each memo you write, you are free to develop the kind of outline that best helps you analyze the legal issue.

#### Example 5-C • A traditional outline that uses Roman numerals

- I. The Neros can establish adverse possession.
  - A. The Neros can establish "actual possession" because they used the land as an owner would.
  - B. The Neros can show they possessed the land "openly and notoriously" because the owner had constructive, if not actual, notice.
    - 1. The true owner did not have actual notice of the claim because she lived in Wisconsin.
    - 2. The true owner did have constructive notice of the claim sufficient to satisfy the "open and notorious" element.
- II. [Next issue being litigated]

Although outlines come in different forms, effective outlines share some basic properties. To create an effective outline, organize it around points of law, such as elements or factors, not individual authorities. Then, for each element or factor in the governing rule, sketch the law that will be relevant to your client's case. Finally, sketch the facts from your client's case that would be relevant to determining whether that condition exists in your client's case. This explanation of the law and the relevant facts from your client's case will form the basis of a single legal argument.<sup>1</sup>

The adverse possession outline in [Example 5-D](#) and the burglary outline in [Example 5-E](#) show two effective outlines, formatted in different ways, but with the same properties. The adverse possession outline in [Example 5-D](#) is not overly detailed but gives a clear picture of how the writer plans to develop the discussion. Such an outline format would probably work well for people who are linear thinkers.

#### Example 5-D • Adverse possession outline

##### Introduction

- Neros will prove AP.
- Background
  - Governing rule – actual, open and notorious, exclusive, hostile, continuous, for 10 years.
  - Statute not applicable.
    - Statute: applies only to claims that vest and are filed after 1/1/90.
    - Neros' claim vested before 1/1/90.

“Actual possession” is the first element the memo will examine.

## 1. Actual Possession

First, the attorney sketches the law relevant to “actual possession.”

- Law
  - Use land as an owner would. Zambrotto at 65.
    - Fence & plant vegetation. Slak at 518-19.
    - Same as adjoining land. Davis at 806.
    - Hunting and rattlesnake. Davis at 806-07.

Second, the attorney sketches the facts from his client's case relevant to whether the client “actually possessed.”

- Neros' case
  - Can show actual possession
    - Like Slak: Claimant in Slak built fence and planted. Neros built fence, planted garden, orchard.
    - Like Davis: Used adjoining land in same way: both contained garden and orchard.

The process repeats. Each element is identified, and the author lists the relevant law and the facts from the client's case that determine whether the element is present.

## 2. Open and Notorious

- Owners must have actual or constructive notice. Slak at 518-19.
  - Element splits into two parts.
- Actual Notice
  - Law
    - Only when owner actually knows about claim. Slak at 519.
  - Neros' case
    - Neros can't claim actual notice. Cramer did not actually know about claim. Lived in Wisconsin.
- Constructive notice
  - Law
    - Use gives knowledge to actual owner. E.g., Hoffman at 110.
    - Use does not have to be visible from owner's property. Davis at 807.
      - Fence = constructive notice even though not visible to actual owner. Davis at 807.
    - Intermittent use o.k. Hoffman at 110.
      - E.g., grazing during pasturing season + fence. Hoffman at 110.
  - Neros' Case
    - Stronger than Davis: Fence + visible.
    - Like Hoffman: seasonal use (planted vegetation and maintained fence).
  - Opposing Argument
    - Zambrotto – No constructive notice when fence covered only part of disputed property line and no “no trespassing” sign. See Zambrotto at 66, 68-69.
    - Rayburn (same).



- ### 3. Exclusive

- For people who are more visual thinkers, other formats might be more useful. One such format is a “whirlybird.”<sup>2</sup> In a whirlybird, various points of the discussion are represented as spokes coming out of a wheel. [Example 5-E](#) shows the burglary question (from [Example 5-A](#)) outlined in the whirlybird style.

[illegible]

If the whirlybird seems too odd, try a flow chart or a graphic of connecting bubbles. The point is, no matter how “odd” your visual representation might look to an outside observer, if it

helps you organize your discussion logically and effectively, use it.

Once you start drafting, use your outline—in whatever form—to guide your writing. Typically, having spent the time to think through your organization and the relevant law and facts, the writing will proceed more smoothly.

If you are in the midst of drafting your discussion and you realize that your organizational plan is not working, stop writing. Sometimes we are unable to see the gaps in our own logic until we actually put our thoughts onto paper. When that happens, stop writing. Revise your organizational plan. Then, try again.

Do not skip outlining. Your organization will be clearer to the reader; you can more easily cull the information you don't need; and best of all, organizing *before* you write can help you write more efficiently.



### III. Give Your Audience What It Needs

As you organize, remember what your audience needs. You will be writing for a particular reader who needs to make a legal decision based on the analysis you have done. Your audience needs to see a cogent, well-organized analysis that accurately predicts how the relevant law will apply to your client's facts.

Your audience does not need to retrace the thought process you went through to get to the answer. Organizing the memo in the same way you came to understand the information may not yield a clear organization that the attorney relying on your work product can understand. Writing and getting thoughts down onto paper without charting and outlining can be a great way to overcome writer's block or to help you understand a complex issue, but doing that should not be the final work product you provide to the attorney.

Your reader wants your argument ordered and developed around the legal points—the elements or factors—contained in the governing rule. Breaking down the governing rule into its elements or factors, charting cases to synthesize the law about each element or factor, and then outlining your argument according to those elements or factors will allow you to produce what your reader needs—a clear prediction of how the current law will apply to your client's facts. Remember, this process of finding and organizing your argument is really about good legal thinking. Without good legal thinking, your writing will not be clear.

After organizing the legal authorities, you are ready to write.

#### Practice Points



- Organizing your legal authorities while you research is a critical step to producing a cogent work product.
- Organize your ideas around the working parts of the governing rule, not around individual cases or a description of the evolution of the governing rule.
- Chart cases as you go through the research process. Charting can help you see the relationships among the various authorities you found while researching and the patterns emerging in past cases. Charting can also help you decide the best cases to select for your memo or see holes in your research.
- Always take time to outline before you write. Whether you use a traditional or non-traditional format, outlining will help you produce an analytically stronger memorandum in less time because it helps you see how the pieces of your legal puzzle will fit together.
- Give your audience what it needs. Attorneys want to see an argument arranged around the governing rule and its component parts; therefore, follow the structure the governing rule dictates. Do not simply memorialize the way you thought through the issues.

<sup>1</sup> These guidelines assume that your client's legal question raises only one legal claim, such as a claim to take title to land through adverse possession. As you gain experience, clients' questions may raise multiple claims (such as trespass and unjust enrichment), which your outline would also reflect.

<sup>2</sup> Bryan A. Garner, *The Winning Brief* 29 (Oxford Univ. Press 2001).

## Chapter 6

### One Legal Argument

After you have determined the governing rule and organized your research according to the elements or factors in the governing rule, you are ready to construct the legal arguments that will guide your prediction to your client's question.

As explained in [Chapter 4](#), *Finding Your Argument*, you will need to construct one legal argument for each element or factor in the governing rule. Taken together, those arguments will explain why you are predicting a particular outcome to your client's question.

Over time, attorneys have established a common preference for how a legal argument is presented. Typically, a single legal argument has four components presented in the following order:

1. **A conclusion about, or statement of, the legal issue,**
2. **An explanation of the law,**
3. **An application of the law to the client's facts, and**
4. **A final conclusion.**

The initial conclusion or statement of the issue tells the reader the direction of the argument. When a reader knows where a writer is heading, the reader can more easily understand the argument that follows and why particular details are relevant. In most circumstances, a conclusion that specifies the bottom-line result of your analysis is more helpful to the reader than a general statement of the issue to be explored. For that reason, this book typically begins legal arguments with a conclusion. (Later, we will discuss instances in which an issue statement is appropriate.)

Next, attorneys explain the law. The explanation of the law educates the reader about the relevant law and shows how that law has been applied by courts in the past. In explaining how the law has been applied in the past, the attorney establishes the analytical framework that will be applied to the client's case.

After establishing that framework, an attorney then applies that law to the facts of a client's case to explain why a particular outcome is likely. In a simple case, applying the law may mean showing how an established rule of law will function in a client's case. In a more difficult case, applying the law may also mean explaining why a client's case is like or unlike previous cases and how those comparisons yield a particular legal result.

Because the application section explains why a particular outcome is likely, the application leads directly to the final part of the argument, the argument's conclusion. Although stating the conclusion at the beginning and at the end of an argument may seem repetitious, attorneys find it helpful to both tell the reader where the argument is headed and to remind the reader of the argument's point at the end.

Attorneys find that this structure is an effective way to communicate a legal argument, and they will expect you to communicate your arguments in the same way. In fact, if you look closely at the appellate court cases you are reading, you may be able to see this same structure in the courts' arguments.

Writing within this structure takes practice. As they are becoming accustomed to this structure, some attorneys use mnemonics to help them remember its components and their order. Although the mnemonics they use may differ, each mnemonic leads to the same structure. We describe some of the mnemonics commonly used in [Tables 6-A](#) through [6-C](#) and show how they match up with the four-part structure described above.

**Table 6-A • IRAC**

Mnemonic	What it means	This book's analogous term
I	Issue	Conclusion or issue
R	Rule	Explain the law
A	Application	Apply the law
C	Conclusion	Conclusion

**Table 6-B • CREAC**

Mnemonic	What it means	This book's analogous term
C	Conclusion	Conclusion
R	Rule(s)	Explain the Law
E	Explanation of the rules	
A	Application of the law	Apply the law
C	Conclusion	Conclusion

**Table 6-C • CRRPAP**

Mnemonic	What it means	This book's analogous term
C	Conclusion	Conclusion
R	Rule(s)	Explain the Law
R P	Rule proof	
A	Application of the rule and rule proof	Apply the law
P	Prediction	Conclusion

No matter the mnemonic you use, and even if you use no mnemonic, the goal is the same: to explain whether each element or factor in a legal argument exists in your client's case. By constructing an argument for each element or factor and presenting it in the expected way, you will be able to effectively explain the likelihood of a particular outcome in your client's case.

You can see how these parts come together to form a legal argument in [Example 6-D](#). [Example 6-D](#) is a single legal argument extracted from the memorandum you saw in [Chapter 1](#). We have annotated it so you can see the parts of the legal argument.

### **Example 6-D • One legal argument**

The **conclusion** (Ch. 9).

The **explanation of the law** (Ch. 7) begins with the definition of a “stop” and continues for the next two paragraphs.

This paragraph explains the rules ([§7.1](#)) courts have used in the past to determine whether an encounter is a stop.

In this case, a court will likely admit Mr. Adams's statement, holding that Mr. Adams's encounter with the officer was mere conversation rather than a stop. A “stop” occurs if a person's liberty is restrained, by physical force or a show of authority, by a peace officer lawfully present in any place. Or. Rev. Stat. §131.605 (6)(2007); *State v. Warner*, 901 P.2d 940, 942 (Or. Ct. App. 1995). A person's liberty may be restrained if an individual believes that his liberty has been restrained and that belief is objectively reasonable. *Warner*, 901 P.2d at 942. To determine whether a person reasonably believes his liberty has been restrained, a court will consider the totality of the circumstances. *State v. Wenger*, 922 P.2d 1248, 1251 (Or. Ct. App. 1996). If, under the totality of the circumstances, a person could not reasonably believe his liberty was restrained, the encounter is “mere conversation.” *See, e.g., State v. Smith*, 698 P.2d 973, 975 (Or. Ct. App. 1985).

This paragraph and the next provide case illustrations ([§7.2](#)). The case illustrations explain how the rules, described above, were applied to cases that are factually similar to the client's case.

A police officer may request information without restraining a person's liberty. In *State v. Gilmore*, an officer requested identification from three people who were sitting in a truck. 860 P.2d 882, 883 (Or. Ct. App. 1993). When the defendant opened the glove compartment to retrieve his identification, the officer saw a gun and arrested the defendant for illegal possession of a firearm. *Id.* Although the defendant argued he had been illegally stopped and,

therefore, evidence of the gun should be excluded from trial, the trial court admitted the gun into evidence. *Id.* In upholding the trial court's decision, the Court of Appeals explained that, even if the defendant felt he was not free to leave, that belief was not objectively reasonable. *Id.* The Court of Appeals explained that, although the officer requested identification, the officer did not require the defendant to alter his course, nor did the officer prevent the defendant from leaving. *Id.*

Notice that the explanation of the law does not mention the client.

By contrast, a person may reasonably believe his liberty has been restrained if a police officer blocks that person's car. *Wenger*, 922 P.2d at 1251. In *Wenger*, the defendant was intending to leave a parking lot when uniformed officers parked their patrol car and blocked in the defendant's car. *Id.* The *Wenger* court held that the defendant had been stopped, reasoning that a stop occurs whenever an officer prevents a vehicle from being driven away. *Id.* at 1251-52.

After explaining the law, the attorney **applies the law** (Ch. 8) to the client's case.

The signal that the writer has finished explaining the law and begun applying the law is the introduction of the client.

In this case, a court is likely to hold that Paul Adams could not reasonably believe his liberty had been restrained and that, therefore, the encounter was mere conversation. Mr. Adams's encounter is similar to the encounter in *Gilmore*. In both cases, an officer approached the defendant seeking information. In *Gilmore*, the officer asked for identification, and in Mr. Adams's case the officer wanted to learn whether the defendant was involved in the bank robbery.

However, seeking information is not enough to convert a conversation to a stop. In Mr. Adams's case, as in the *Gilmore* case, the officer did not alter the defendant's course or prevent him from leaving. Officer Ephgrave asked Mr. Adams whether he was planning to leave. Mr. Adams said he was not. In addition, Officer Ephgrave said that he would move his car before Mr. Adams had to leave. According to Officer Ephgrave, Mr. Adams agreed, saying "Oh, okay. No problem." Therefore, Officer Ephgrave did not prevent Mr. Adams from leaving, nor did the officer alter Mr. Adams's course. Thus, a court should follow the reasoning in *Gilmore* and conclude that Mr. Adams could not reasonably believe his liberty was restrained.

The application does not include any new law. The attorney relies on law that has been explained above in the explanation of the law.

In fact, a court is likely to find Mr. Adams's encounter with the officer to be even less restrictive than the encounter in *Gilmore*. In addition to not altering Mr. Adams's course and not preventing him from leaving, Officer Ephgrave was not in uniform. Because Mr. Adams believed he was talking to a civilian, Mr. Adams should have felt even more free to leave than did the defendant in *Gilmore*, who knew he was talking to a uniformed officer. Thus, a court is likely to hold that Mr. Adams's encounter with the officer was mere conversation and that the evidence is admissible.

The application ends with a **conclusion** (Ch. 9).

Even though Officer Ephgrave's car did block Mr. Adams's car, a court is likely to distinguish Mr. Adams's case from the *Wenger* case. In the *Wenger* case, the court noted that the defendant was intending to leave at the time his car was blocked. By contrast, Mr. Adams told Officer Ephgrave that he was "going to sit a little while longer," suggesting that he was not intending to leave. Because he was not intending to leave, a court is less likely to conclude that he reasonably felt his liberty was restrained. Accordingly, a court will likely determine that Mr. Adams was not stopped and that his statement about the lollipop is admissible.

Writing within this prescribed structure may seem confining at first. Over time, though, you will not only become accustomed to it, you will begin to look for it in legal arguments. You may even find yourself frustrated when a legal argument is not presented in this form.

As you are becoming accustomed to this form, you might think of it like a haiku. A haiku is a Japanese form of unrhymed poetry with a strict form. It is three lines long, with five syllables in the first line, seven syllables in the second line, and five syllables in the third. Just as a haiku must be written in this form to be a haiku, so too a legal argument must be written in its form. But within each form, there is much you can do.

The next three chapters explain each component of a single legal argument. [Chapter 7](#), *Explaining the Law*, describes how to explain the law relevant to each element or factor. [Chapter 8](#), *Applying the Law*, explains how to apply the law to predict outcomes about each

element or factor. And [Chapter 9](#), *Conclusions to One Legal Argument*, discusses the conclusions that will precede and sum up each argument.

## Chapter 7

# Explaining the Law

### [§7.1 Rules](#)

### [§7.2 Case Illustrations](#)

### [§7.3 Citing and Avoiding Plagiarism](#)

When writing a legal argument, you must explain the law on which your conclusion will rest. To explain the law, you will explain how the relevant authorities you located in your research fit together—that is, you will draw on all the authorities you have researched and synthesize a cohesive explanation of the law as it pertains to your client. That synthesized explanation of the law will set out the rules governing your client’s legal question and will explain how courts have applied those rules in past, similar cases.

By explaining the law, you explain the legal foundation for your argument. Providing that legal foundation is the primary purpose of your explanation of the law.

In addition, your explanation of the law educates the reader about the relevant law. By explaining the rules and how courts have applied those rules in the past, you will educate the reader about the law that will apply to your client’s case.

Finally, your explanation of the law previews the analytical steps you will follow in your analysis. The framework you present when you explain the law is the same framework you will later apply to your client’s case in the application section of your argument.

As you explain the law, remember two things: First, an explanation of the law is a *focused* description of the law. Because the explanation is a focused description of the law, it should include only the information needed to analyze the element or factor relevant to your client’s case. Your explanation of the law should not include an idea just because it is “interesting.” Attorneys do not like to waste time. They do not want to read about tangential issues, nor do they want to read about how the law evolved. Attorneys want to read *only* those ideas relevant to understanding the law applicable to a client’s case. Therefore, any explanation of the law that you will not rely on to analyze your client’s facts should be omitted from your explanation of the law.

### Sidebar

When you choose what to include in your explanation of the law, you should *think* about your client and the law that is relevant to your client’s case; however, when *writing* the explanation of the law, do not write anything specifically about your client. Remember, your client’s situation will be addressed in the application section.

Second, your explanation of the law should not mention your client’s case. Attorneys prefer that their first look at the relevant law be stripped of any mention of a particular client. In that way, the attorney can absorb a clear understanding of the law without it becoming muddled with the particulars of a client’s case. (You will connect the law and your client’s facts later in the application section.)

In fact, one test for a well-organized argument is whether a line can be drawn that will separate your explanation of the law from your application of the law. Look at a basic explanation of the law in [Example 7-A](#), and you can see how this line might be drawn.

### Example 7-A • Basic explanation of the law

The argument begins with a **conclusion**.

The **explanation of the law** describes the rules that determine whether the element of “actual possession” is present. It then illustrates those rules by describing cases.

Notice that, after the conclusion, there is no mention of the client, the Nero family.

Mr. and Mrs. Nero can most likely prove actual possession. Plaintiffs must establish actual possession by showing that they used the land as an owner would use that particular type of land. *Zambrotto v. Superior Lumber Co.*, 4 P.3d 62, 65 (Or. Ct. App. 2000). The courts focus on the type of use for which the land is suited and do not necessarily focus on the amount of activity. *Id.* Plaintiffs in past cases have shown that they used the disputed land as an owner would in a variety of ways. *See, e.g., Davis v. Park*, 898 P.2d 804, 806-07 (Or. Ct. App. 1995); *Slak v. Porter*, 875 P.2d 515, 518 (Or. Ct. App. 1994). In *Davis*, the plaintiffs established that they used the disputed property as an owner would by showing that they used the disputed property as they did their adjoining land. 898 P.2d at 806-07. In *Slak*, the plaintiffs built a fence and planted vegetation and, in that way, proved actual possession. 875 P.2d at 518.

The **application of the law** begins here when the client is introduced.

Mr. and Mrs. Nero should be able to prove that they had actual possession of their land because they used the disputed property in a manner that an owner would. Like the landowners in *Davis*, the Neros used the disputed land exactly as they did their adjacent land: in both parcels of land, they planted and maintained a garden and fruit trees. In addition, like the plaintiffs in *Slak* who showed actual possession by building a fence and planting vegetation, the Neros built a fence and planted vegetation in their garden and orchard. The Neros should, therefore, be able to prove that they actually possessed the disputed land.

To draft an effective explanation of the law, you will need to understand its two most common components—rules and case illustrations. In this chapter, you will become more familiar with those components and how to use them to create a logical, cohesive explanation of the law.

## Section 7.1

### **Explaining the Law: Rules**

[I. The Role of Rules](#)

[II. Finding the Rules](#)

[A. Explicit Rules](#)

[B. Implicit Rules](#)

[III. Writing the Rules](#)



I. The Role of Rules

When you begin explaining the law relevant to a particular element or factor, first explain the rules. As we discussed earlier, a rule sets a standard.<sup>1</sup> With respect to a given element or factor, rules tell a court how to determine whether that element or factor was present in your client’s case. Any explanation of the law must start with the prevailing standard that controls the conduct at issue.

To explain the prevailing standard, you will usually need to explain a group of rules. Some rules will describe broad, over-arching principles. Other rules, sometimes called sub-rules, provide smaller, more specific explanations about the standard.

[Example 7.1-A](#) shows a group of rules in an explanation of the law. In that example, the rules explain what a plaintiff must do to prove he actually possessed land long enough to claim ownership in a claim for adverse possession. The first sentence is a broad rule that defines the standard for when actual possession is proven. The second sentence identifies two smaller, more specific sub-rules that describe the kinds of facts courts look for to determine actual possession. Together, these rules describe how a court will determine whether a person “actually possessed” the land in dispute.

Example 7.1-A • Rules describe a prevailing standard

Broad rule  
More specific rule explains the broad standard

Plaintiffs can establish actual possession by showing that they used the land as an owner would use that particular type of land. *Zambrotto v. Superior Lumber Co.*, 4 P.3d 62, 65 (Or. Ct. App. 2000). The courts focus on the type of use for which the land is suited and do not necessarily focus on the amount of activity. *Id.*

[Table 7.1-B](#) shows graphically the relationship amongst the rules that define “actual possession.”

Table 7.1-B • Relationship of rules that define “actual possession”

Adverse Possession Governing rule	Is established by proving <b>actual</b> , open, notorious, exclusive, hostile, and continuous <b>possession</b> for 10 years.	
Actual Possession Broad rule	Is established by proving.... Plaintiffs used the land as an owner would use that particular type of land.	Broad rule and sub-rules for one element
Sub-rule 1	Courts focus on whether the plaintiff’s use conforms to the uses for which the land is suited.	
Sub-rule 2	Courts do not focus on the amount of activity or use on the land.	

To explain the rules, you must first identify the rules that will be relevant to your client’s case.

## II. Finding the Rules

As you research the law, you will look for those rules—both broad and narrow—that will determine whether an element or factor is present in your client’s case. The rules will likely come from two places: statutes and case law. Sometimes a statute or case law will clearly state the rules that govern the element or factor you are analyzing. Those rules are called explicit rules. Other times, however, finding the relevant rules requires you to sift through case law and synthesize a rule. Those rules are called implicit rules. To explain the relevant law, you will need to gather together both explicit and implicit rules relating to the element or factor being explored. (As explained in [Chapter 5, Organizing Your Legal Authority](#), case charts can help you identify both explicit and implicit rules.)

### A. Explicit Rules

Statutes and case law will usually explicitly state the standards that govern an element or factor. For example, in [Example 7.1-C](#), a statute defines when a person is “stopped.”

#### Example 7.1-C • A statute provides an explicit rule

A “stop” occurs if a person’s liberty is restrained by a peace officer lawfully present in any place. Or. Rev. Stat. §131.605(6) (2007).

Case law may then provide sub-rules that further define when that element is met, as in the next example, [Example 7.1-D](#).

#### Example 7.1-D • Rules derived from a statute and case law explaining the statute

Broad rule

More specific sub-rules explain the broad standard.

A “stop” occurs if a person’s liberty is restrained, by physical force or a show of authority, by a peace officer lawfully present in any place. Or. Rev. Stat. §131.605(6)(2007); *State v. Warner*, 901 P.2d 940, 942 (Or. Ct. App. 1995). A person’s liberty may be restrained if an individual believes that his liberty has been restrained and that belief is objectively reasonable. *Warner*, 901 P.2d at 942. To determine whether a person reasonably believes his liberty has been restrained, a court will consider the totality of the circumstances. *State v. Wenger*, 922 P.2d 1248, 1251 (Or. Ct. App. 1996). If, under the totality of the circumstances, a person could not reasonably believe his liberty was restrained, the encounter is “mere conversation.” *See, e.g., State v. Smith*, 698 P.2d 973, 975 (Or. Ct. App. 1985).

In the absence of a statute, case law may provide all the rules you need to explain an element, as in [Example 7.1-E](#).

#### Example 7.1-E • Rules derived from case law only

Broad rule

More specific sub-rule explains the broad standard.

Plaintiffs can establish actual possession by showing that they used the land as an owner would use that particular type of land. *Zambrotto v. Superior Lumber Co.*, 4 P.3d 62, 65 (Or. Ct. App. 2000). Courts focus on the type of use for which the land is suited and do not necessarily focus on the amount of activity. *Id.*

Usually, you will find the necessary rules explicitly stated in a statute or case law; some rules, however, are not clearly stated but implicit in the courts’ decisions.

### B. Implicit Rules

When courts do not state explicitly the standard they used to conclude whether an element or factor is present, you will have to explain the standard by weaving together a rule from the cases you have read. When attorneys explain a standard that courts are relying on, but which is hidden within the case law, we call the standard an “implicit rule.”

Experienced attorneys read cases with an eye toward making explicit what the courts are doing implicitly. An implicit rule can explain why courts consistently reach the same decision.

It can explain why seemingly inconsistent court decisions are, in fact, consistent. And it can explain a new element or factor that courts will consider when reaching a conclusion.

**Sidebar**

Synthesizing means combining principles stated in a series of authorities to form one rule.

**1. When to synthesize an implicit rule**

When the standard has not been explicitly stated, you will need to synthesize cases to find that implicit rule. When you synthesize a rule, you derive one rule by looking at the principles courts relied on in a series of cases. Let’s look at the three typical circumstances in which an attorney might derive an implicit rule—that is, synthesize a rule—from a series of authorities.

(a) Example 1: Finding an implicit rule from consistent decisions

Sometimes after reading a series of cases, you will see that every time a certain fact is present a court will usually reach a particular conclusion. This fact is a common denominator. If you see a common denominator in a series of cases, you should identify it for your supervising attorney.

Let’s assume that you have just met with a client who owns a biotechnology company in Cary, North Carolina. His ex-business partner has started a blog and published false personal statements about him. The false statements have resulted in a significant loss of business. Your client wants to know whether he can sue for intentional infliction of emotional distress.

In North Carolina, the courts have established an explicit three-element test to determine when someone may be liable for intentional infliction of emotional distress.

**Example 7.1-F • North Carolina’s test for intentional infliction of emotional distress**

In North Carolina, the elements of intentional infliction of emotional distress are “(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress.” *Dickens v. Puryear*, 276 S.E.2d 325, 332 (N.C. 1981).

Even though North Carolina has an explicit governing rule, it turns out that the courts have not clearly defined the first element—when someone’s conduct is extreme and outrageous. As a result, you will need to extract an implicit rule to define when someone’s conduct is extreme and outrageous.

Two cases appear to be relevant to your client’s question. Read the synopses of the two cases in [Table 7.1-G](#), and see if you can determine a common denominator.

**Table 7.1-G • Synthesize these cases**

Case	Facts	Holding
<i>Woodruff v. Miller</i> , 307 S.E.2d 176, 178 (N.C. Ct. App. 1983).	Defendant posted copies of warrants on a wanted board to create the impression that plaintiff had broken the law and had not been punished.	Yes. Conduct was extreme and outrageous.
<i>West v. King’s Dep’t Store, Inc.</i> , 365 S.E.2d 621, 623-25 (N.C. 1988).	A store manager repeatedly accused innocent customers of shoplifting in the presence of other store patrons.	Yes. Conduct was extreme and outrageous.

The common denominator you might identify is that in both cases (1) defendants made public accusations, and (2) defendants accused plaintiffs of socially unacceptable behavior. Based on those common denominators you could now create a rule, such as the one in [Example 7.1-H](#).

**Example 7.1-H • Synthesized rule**

Conclusion about the element  
Synthesized rule

#### Beginning of a case illustration

The business partner's statements in his blog likely constitute extreme and outrageous conduct. A public accusation of socially unacceptable behavior is evidence of extreme and outrageous conduct. See *Woodruff v. Miller*, 307 S.E.2d 176, 178 (N.C. Ct. App. 1983); *West v. King's Dep't Store, Inc.*, 365 S.E.2d 621, 623-25 (N.C. 1988). In *Woodruff v. Miller*, for example, the defendant posted copies of warrants....

This new rule would be included in your explanation of the law describing when someone's conduct is extreme and outrageous, even though no court had ever explained it that way.

Relying on your own reading and understanding of cases to create a synthesized rule can be uncomfortable at first. This task is a major part of an attorney's work, and you will get more comfortable with this process as you gain experience in reading and understanding cases.

#### (b) Example 2: Finding consistency in seemingly inconsistent cases

Sometimes courts will reach opposite conclusions in cases that seem to have similar facts. When that occurs, do not immediately assume that the decisions are inconsistent. Rather, look for a reason why the courts came to opposite conclusions and explain that reason to your reader.

Even when court decisions *seem* inconsistent, attorneys nevertheless assume that the decisions *are consistent*. Stare decisis requires a court to reach the same decision as a prior court given similar facts. Therefore, if two courts come to different conclusions on cases with similar facts, attorneys assume a reasoned distinction exists to explain the different outcomes. Explaining that reasoned distinction will help the senior attorney with whom you are working.

Here is a second example of synthesizing a rule, but this time the synthesized rule identifies a reasoned distinction to explain why two cases reach opposite conclusions.

A client was out bicycling in Arcata, California, with her husband. She saw him round a curve, then heard a crash and a scream. When she rounded the curve, she saw her husband had been hit by a car. You would like to consider whether your client, the wife, can sue the driver for her emotional damages after seeing her injured husband. In California, a person who witnesses an accident to a family member can sue for emotional damages if, among other things, she was "then aware" of the injury to the family member.

You need to find out more about what it means to be "then aware" of the injury. You find two relevant cases that seem factually similar in that the plaintiff in neither case actually saw the accident or the injury to the family member. Yet, in the first case, *Krouse*, the court held that the plaintiff was "then aware" of the injury, and in the second case, *Fife*, the plaintiff was not "then aware." Look at the case excerpts in [Table 7.1-I](#) and think about how the cases can be reconciled.

**Table 7.1-I • Reconcile these cases**

Case	Facts	Holding
<i>Krouse v. Graham</i> , 137 Cal. Rptr. 863 (Cal. 1977).	A husband knew his wife was standing by the trunk of his car. In his rear view mirror he saw a car approach. He then felt his car being hit by the other car. The plaintiff admitted that he did not actually see the other car strike his wife.	Yes. The husband was "then aware" of the injury to his wife.
<i>Fife v. Astenius</i> , 284 Cal. Rptr. 16 (Cal. App. 4th Dist. 1991).	A father heard a crash and saw debris fly over a wall. The father rushed out to the street and within seconds discovered his daughter was in the car accident.	No. Father was not "then aware."

Looking for a reasoned distinction to explain the different outcomes, you might notice that in *Krouse* the plaintiff knew the family member was in the precise location of the accident and, therefore, knew that the family member was almost certainly in the accident. By contrast, in *Fife*, although the plaintiff knew of the accident, the plaintiff did not know the family member's location prior to the accident. You might synthesize a rule that explains that whether

a person is “then aware” of an injury depends on knowing the family member’s location at the time of the accident, as in [Example 7.1-J](#).

### **Example 7.1-J • Synthesized rule explains seemingly inconsistent cases**

Conclusion about the element

Synthesized rule begins explanation of the law

Beginning of case illustration

Gabrielle Lafille has a strong argument that she was “then aware” of her husband’s injury. For a plaintiff to be then aware, a plaintiff need not see the injury occur. *Krouse*, 137 Cal. Rptr. at 871. Rather a plaintiff is then aware of a family member’s injury if she was aware of the accident’s location and knew the family member was in exactly that location as the accident occurred. *Krouse*, 137 Cal. Rptr. at 871; *Fife*, 284 Cal. Rptr. at 18. In *Krouse*, the court held that the plaintiff was then aware of the accident that injured a family member....

The synthesized rule in [Example 7.1-J](#) (shaded) refines our understanding of when someone is “then aware” by explaining that the plaintiff does not need to see a family member get injured; rather, a plaintiff can prove she was then aware if she knew the family member’s location and the location of the accident as it was occurring. By identifying a reasoned distinction, you will help your reader understand how courts reach their conclusions.

#### **(c) Example 3: Bringing parts together to form a whole**

Sometimes, over time, courts add to the requirements necessary to establish an element. When you describe the law, you may need to acknowledge the additional requirements in your rules. An Oregon court did just that when it explained Oregon’s standard for determining whether a stop had occurred. In Oregon, a statute defines when a stop occurs, as shown in [Example 7.1-K](#). According to the statute, a stop occurs when a police officer restrains a person’s liberty.

### **Example 7.1-K • Statute defines element**

A “stop” is a temporary restraint of a person’s liberty by a peace officer lawfully present in any place. Or. Rev. Stat. §131.605 (2005).

When the Oregon Court of Appeals later described when a stop occurs, it reviewed the relevant case law and added that a “restraint” may be by physical force or a show of authority ([Example 7.1-L](#)).

### **Example 7.1-L • Case law adds to statutory definition**

A “stop” is a temporary restraint, whether by physical force or a show of authority, of a person’s liberty by a peace officer lawfully present in any place. *State v. Warner*, 901 P.2d 940, 942 (Or. Ct. App. 1995).

Thus, the court reviewed prior case law, determined that prior case law added to the statutory definition of a stop, and the court included that information in the rule so that the reader would have a concise, complete definition of a stop in one place. In doing so, the court helped the reader by establishing an explicit rule that combines the statutory rule with case law.

## **2. Dare to explicitly state an implicit rule**

New lawyers often get nervous about explaining implicit rules. New lawyers feel safer putting in their arguments only the language that they have seen in cases. But remember this: An attorney adds value by making explicit those themes that would otherwise remain obscured in a morass of case law.

To clarify case law and add value for your client, you must read the case law at multiple levels. To do so, ask questions:

- What are the courts *saying* the rules are?
- What are the courts actually *doing*?

By comparing what the courts are *saying* the rules are with what the courts are *doing*, you may see unexplained areas of the law. By looking at what courts are doing over a series of

cases, you may also see themes, which when explained will clarify the standard courts are using to reach a decision.

You will be more valuable to other attorneys you work with and to your client if you can see and explain both the explicit and implicit rules in the case law. So, when you see a theme in the case law that will help explain how courts reach their conclusions, don't be shy, share it.

Now, that doesn't mean that you can put any old thing you want into your rules. Remember, each rule must have a basis in the case law. Any rule that you draw out of the cases must be consistent with all the other law that bears on the issue, including other case law, statutes, and legislative history.

Finally, although this section spends a lot of time discussing how to extract implicit rules from the case law, please realize that courts are usually explicit about the rules they are relying on, so you will not always have to dig out the implicit rules. We have spent more time discussing implicit rules simply because it is relatively easy to find explicit rules and relatively difficult to find implicit rules.

### III. Writing the Rules

#### • Write about the rules as they are today, not how they developed

The first trick to writing the rules is knowing that attorneys typically do not care how the rules came to be the rules. Nor do they care about the mental gymnastics you went through to synthesize a rule from case law. Attorneys simply care about the rules as they are today, the rules the courts will use when analyzing your client's case.

Compare the rules in examples 7.1-M and 7.1-N. Which is the better statement of the rules?

#### Example 7.1-M • Rules describe current law

Conclusion about the element

Explanation of the law begins with this rule.

Synthesized rule explains what courts look for to determine extreme and outrageous conduct.

The business partner's statements in his blog were likely extreme and outrageous conduct. A defendant's conduct is extreme and outrageous if the conduct exceeds "all bounds usually tolerated by decent society." *Stanback v. Stanback*, 254 S.E.2d 611, 622 (N.C. 1979) (citing Prosser, *The Law of Torts* §12, at 56 (4th ed. 1971)). A public accusation of socially unacceptable behavior is evidence of extreme and outrageous conduct. *West v. King's Dep't Store, Inc.*, 365 S.E. 2d 621, 623-25 (N.C. 1988).

#### Example 7.1-N • Text describes rules' development

The business partner's statements in his blog were likely extreme and outrageous conduct. A defendant's conduct is extreme and outrageous if the conduct exceeds "all bounds usually tolerated by decent society." *Stanback v. Stanback*, 254 S.E.2d 611, 622 (N.C. 1979) (citing Prosser, *The Law of Torts* §12, at 56 (4th ed. 1971)). In *Woodruff v. Miller*, 307 S.E.2d 176, 178 (N.C. Ct. App. 1983), the Court of Appeals held that extreme and outrageous conduct existed when the defendant publicly accused the plaintiff of breaking the law. Several years later, in *West v. King's Dep't Store*, 365 S.E.2d 621, 623 (N.C. 1988), the Supreme Court, following *Woodruff*, held that the defendant's conduct was extreme and outrageous because he also made a public accusation of illegal behavior in the presence of others. These cases suggest that public accusations of illegal behavior are evidence of extreme and outrageous conduct. See *Woodruff*, 307 S.E. 2d at 178; *West*, 365 S.E.2d at 625.

The writer explains the historical development of the case law.

Finally, the writer explains the point: the synthesized rule.

The first statement of rules in [Example 7.1-M](#) is a better statement because it focuses on the current rules that a court will use to make a decision. By contrast, [Example 7.1-N](#) explains how the rules came into being. Notice how much more concise and direct the first statement is.

Typically, novice legal writers explain the historical development of the case law to prove that a synthesized rule is true. More experienced attorneys have more confidence. They assert their synthesized rule as a correct interpretation of the law. If a reader questions the accuracy of the synthesized rule, the more experienced attorney knows that she has provided citations that will allow the reader to find the case law and verify that the synthesized rule accurately represents the law.

Transforming a novice historical explanation of the law to a more experienced assertion of a synthesized rule is often easy to do. Notice that at the end of the historical explanation of the case law in the second example you just read, [Example 7.1-N](#), the writer does state the synthesized rule. Simply state that final point at the outset of the discussion, as is done in the first example, [Example 7.1-M](#), and you will explain the rule more effectively and efficiently.

#### • Describe broad principles before narrower principles

When an explanation of the law involves a group of rules, attorneys tend to describe a broader rule before describing a more specific rule.

Look at the rules that define "actual possession" in [Example 7.1-O](#).

#### Example 7.1-O • Moving from broad rules to narrow rules

The broad rule is described first.

More specific sub-rules are described second.



Plaintiffs can establish actual possession by showing that they used the land as an owner would use that particular type of land. *Zambrotto v. Superior Lumber Co.*, 4 P.3d 62, 65 (Or. Ct. App. 2000). Courts focus on the type of use for which the land is suited and do not necessarily focus on the amount of activity. *Id.* Plaintiffs in past cases have shown that they used the disputed land as an owner would in a variety of ways, including by using the disputed property as they did their own land, by building a fence, or even by planting vegetation. *See, e.g., Davis v. Park*, 898 P.2d 804, 806-07 (Or. Ct. App. 1995); *Slak v. Porter*, 875 P.2d 515, 518 (Or. Ct. App. 1994).

Notice how the opening rule—explaining that a plaintiff must “use the land as an owner would”—is very broad. The rules become more specific as the discussion progresses. The sub-rules explain specific ways in which an owner can use the land as an owner would, for example, by “building a fence” or “planting vegetation.” Moving from broad to narrow rules makes the discussion clearer for your reader. (Other examples in this section also show explanations of the law in which the rules move from broader to narrower rules. See the rules defining a “stop” in Oregon, [Example 7.1-D](#), and the rules defining intentional infliction of emotional distress, [Example 7.1-M](#).)

- **Build bridges**

A reader needs to know how one rule relates to the next. To help your reader see how rules relate to each other, you can create “bridges” between rules. An easy way to create a bridge is by beginning the second sentence with an idea from the prior sentence.

Look at [Examples 7.1-P](#) and [7.1-Q](#), and determine how the bridge helps the reader.

**Example 7.1-P • A bridge connects two rules**

A court determines whether a person’s liberty is restrained by asking whether the individual believes that his liberty has been restrained and whether that belief is objectively reasonable. *Id.* at 942. Whether the person’s belief is objectively reasonable depends on the totality of the circumstances. *See State v. Wenger*, 922 P.2d 1248, 1251 (Or. Ct. App. 1996).

**Example 7.1-Q • Two unconnected rules**

A court determines whether a person’s liberty is restrained by asking whether the individual believes that his liberty has been restrained and whether that belief is objectively reasonable. *Id.* at 942. Courts look at the totality of the circumstances. *State v. Wenger*, 922 P.2d 1248, 1251 (Or. Ct. App. 1996).

The first example, [Example 7.1-P](#), includes a bridge. The bridge is the repetition of the phrase “belief is objectively reasonable” at the beginning of the second sentence. The repetition helps the reader see how the idea in the first sentence (that a person’s belief must be objectively reasonable) is related to the idea in the second sentence (that courts consider the totality of the circumstances). In [Example 7.1-Q](#), however, the reader must guess the connection between those two ideas.

Don’t make your reader guess how two ideas are connected. Your reader may guess wrong. And even if your reader guesses correctly, your reader will have to pause to make her guess and then pause again to wonder if she guessed correctly. Your reader should not pause. Instead, your reader should be swept along by the clarity and force of your explanation.

- **Use the present tense**

Always describe rules in present tense. Rules are ongoing principles of law. They were applied to past cases and they continue to apply to current cases. The present tense captures the ongoing nature of rules.

- **Quote sparingly**

Quotes are no substitute for analysis. Too many quotations imply that either the writer either did not understand the law well enough, or worse, the writer was too lazy or timid to explain it well.

Rather than quoting, consider what the court said and explain it in your own words. Save quotations for “key language”—that is, particular phrasing or terms of art that need to be conveyed precisely as they were in the original decision. Consequently, quote only the most important sentences or phrases, those that are critical to an understanding of the case. Although



judicial decisions require some deference, you can often craft a better explanation of those relevant concepts than a court did.

- **Write for a non-lawyer**

As you write the relevant rules, pretend you are explaining the rules to someone who is not involved with the practice of law. That is to say, you should try to explain the law to someone you respect, and is intelligent, but who doesn't know this topic. If you imagine that you are explaining the rules to someone unfamiliar with the law, you will probably explain the sophisticated concepts simply, step-by-step, without missing a step in between.

### Practice Points



- Begin your explanation of the law by describing the rules—the standards—courts use to test for the presence of an element or factor.
- Rules are usually *explicitly* stated in statutes and case law.
- Attorneys also derive rules by looking for themes in the case law. These rules are *implicit* rules, meaning that you have to synthesize and reconcile different judicial decisions and statutory language to determine the rule.
- Describe more general principles of the law before more specific principles.
- Create bridges between rules to help your reader see the relationship between rules.

<sup>1</sup> The “governing rule,” described in [Chapter 4](#), *Finding Your Argument*, is one kind of rule. It describes the standard that governs one legal issue. As explained in [Chapter 4](#), lawyers break the governing rule down into elements and factors and then develop one legal argument for each. This chapter focuses on how to explain the rules within one legal argument.

## Section 7.2

# Explaining the Law: Case Illustrations

### I. The Role of Case Illustrations

- A. Clarifying Rules
- B. Proving Rules
- C. Foreshadowing the Application
- D. Representing Legal Principles

### II. The Parts of a Case Illustration

- A. The Hook
- B. Trigger Facts
- C. The Court's Holding
- D. The Court's Reasoning
- E. Order of the Parts
- F. The Length of Case Illustrations

### III. Determining Whether a Case Illustration Is Necessary.

### IV. Using Case Illustrations

- A. Parameters of Behavior
- B. Threshold of Behavior

### V. Choosing Prior Cases

### VI. Organize Around Legal Principles

### VII. The Order of Case Illustrations

### VIII. Writing Case Illustrations

## I. The Role of Case Illustrations

While rules explain how courts determine whether a particular standard is met, “case illustrations” show how those standards were met in actual cases.

In an explanation of the law, rules are generally partnered with case illustrations. In the following example, [Example 7.2-A](#), a broad rule defines “actual possession,” one element in an adverse possession claim. That broad rule—that plaintiffs can prove actual possession by showing they used the land “as an owner would”—is partnered with two short case illustrations. The two case illustrations describe the specific facts that allowed plaintiffs in different cases to prove they “used the land as an owner would.”

### Example 7.2-A • Explanation of the law with rules and case illustrations

Conclusion about the element

Rules begin the explanation of the law.

Mr. and Mrs. Nero can most likely prove actual possession. Plaintiffs must establish actual possession by showing that they used the land as an owner would use that particular type of land. *Zambrotto v. Superior Lumber Co.*, 4 P.3d 62, 65 (Or. Ct. App. 2000). Courts focus on the type of use for which the land is suited and do not necessarily focus on the amount of activity. *Id.* Plaintiffs in past cases have shown that they used the disputed land as an owner would in a variety of ways. *See, e.g., Davis v. Park*, 898 P.2d 804, 806-07 (Or. Ct. App. 1995); *Slak v. Porter*, 875 P.2d 515, 518 (Or. Ct. App. 1994). [1] In *Davis v. Park*, the plaintiffs established that they used the disputed property as an owner would by showing that they used the disputed property as they did their adjoining land. 898 P.2d at 806-07. [2] In *Slak v. Porter*, the plaintiffs built a fence and planted vegetation and, in that way, proved actual possession. 875 P.2d at 518.

Two case illustrations continue the explanation of the law.

Case illustrations perform a variety of functions in your explanation of the law: They can clarify rules; they can prove that you described rules accurately; and they can foreshadow the analytical framework you will use when applying the rule to your client’s case.

## A. Clarifying Rules

First, case illustrations add clarity and precision to the reader’s understanding of the rules. The rules describe general legal principles, but at some point your reader wants to visualize how those general legal principles actually function when applied to a real set of facts.

As an example, look back to the first example, 7.2-A, which addresses when a person “actually possesses” land. The rules explain that a person actually possesses land when a person “uses the land as an owner would.” But what does it mean to “use the land as an owner would”? The rule is a general principle and, therefore, unclear. Details from prior cases reveal that building a fence and planting vegetation qualify as “using the land as an owner would.” Concrete details from a prior case help your reader visualize how the general legal principle described in the rule functions in real life.

## B. Proving Rules

Case illustrations also “prove the rule.”<sup>1</sup> By showing how a past court applied the rule as you described it, a case illustration proves your description of the rule is accurate.

In the actual possession example above, [Example 7.2-A](#), the writer asserted that courts determine whether a plaintiff actually possessed land by looking at whether the plaintiff used the land as an owner would. The case illustrations that follow prove the accuracy of that rule by providing examples of cases in which courts concluded that using land like an owner—for example, by building a fence and planting vegetation—proved “actual possession.”

## C. Foreshadowing the Application

Case illustrations are also the reader’s first look at how a court will apply the relevant rules to a client’s case. Remember, again, *stare decisis*. A court deciding a case today must follow the reasoning of a prior case, if the case today raises the same issue. By choosing case

illustrations that are factually similar to your client's case, your case illustrations will indicate how a court is likely to rule in your client's case.

Also, remember that case illustrations set up the framework you will use later when applying the rules to your client's facts. The important points you make in the illustrations will be made again later when you apply those points to your client's facts in the application section.

#### **D. Representing Legal Principles**

In each of these roles—whether they are clarifying rules, proving a rule is true, or showing how rules will apply in the future—case illustrations represent legal principles. Writing effective case illustrations requires you to stay focused on the legal principle that each case represents. As you are working with your case illustrations, you should ask yourself the following questions:

- *Why* am I describing this prior case?
- What *legal principle* does this prior case establish?
- How is the legal principle represented by this case *relevant to my client's case*?

Answering those questions is easier when you understand what goes into a case illustration.

## II. The Parts of a Case Illustration

Typically, a case illustration has four components taken from a prior case: a hook, “trigger” facts, the court’s holding, and the court’s reasoning. Sometimes those parts overlap. Together, they will illustrate one principle in the rules you just described.

### Example 7.2-B • Parts of a case illustration

Hook  
Trigger facts  
Reasoning  
Holding

A person may reasonably believe his liberty has been restrained if a police officer blocks that person’s car. *Wenger*, 922 P.2d at 1251. In *Wenger*, the defendant was intending to leave a parking lot when uniformed officers parked their patrol car and blocked in the defendant’s car. *Id.* After noting that a stop occurs when an officer prevents a vehicle from being driven away, the court held that the defendant reasonably believed his liberty had been restrained. *Id.* at 1251-52.

### A. The Hook

The hook tells the reader why she should keep reading. The hook states the legal principle that the case illustration will clarify and prove to be true.

You can create a hook in different ways. The first and most straightforward way of creating a hook is to state the court’s holding. For example, the *Wenger* case illustration could be rewritten, as in [Example 7.2-C](#). In that example, the hook is the *Wenger* court’s holding that the defendant’s “liberty had been restrained.” The hook says to the reader, “By reading this case you will learn the circumstances under which one court held that a person’s liberty was restrained.”

### Example 7.2-C • Create a hook by using the court’s holding

The hook introduces the case illustration by explaining the court’s holding.

By contrast, in *Wenger*, the court held that the defendant reasonably believed his liberty had been restrained when officers blocked in the defendant’s car. 922 P.2d at 1252. In that case, the defendant was intending to leave a parking lot when uniformed officers parked their patrol car such that it blocked in the defendant’s car. *Id.* at 1251-52. After noting that a stop occurs when an officer prevents a vehicle from being driven away, the court held that the defendant reasonably believed his liberty had been restrained. *Id.*

A second way to create a hook is to state a legal principle that can be extracted from the case, as in [Example 7.2-B](#), above. In that example, the hook asserts that one legal principle derived from reading the *Wenger* case is that a person may reasonably believe his liberty has been restrained if a police officer blocks that person’s car. The rest of the case illustration proves that the asserted principle is accurately stated and illustrates how that principle was applied in a particular case.

If you use a legal principle as a hook, be sure that the legal principle you use is not simply re-stating a rule that you explained above. That repetition will not be useful to your reader. Instead of repeating a rule, consider moving a rule from the rules section further down so that it acts as a hook. Alternatively, consider what narrower, more specific rule might be extracted from the case illustration and state that to introduce the case.

Because the hook explains the relationship between rules and prior case law and helps focus the reader’s attention on what she should be learning, the hook often distinguishes excellent legal writing and analysis from serviceable legal writing and analysis.

### B. Trigger Facts

Trigger facts are those facts that “triggered” a court’s holding in a prior case. These facts help the reader see *why* the court reached its conclusion. You might think of them as the facts that were “critical” or “key” to the court’s decision.

Many judicial opinions begin with a recitation of facts; however, to determine the facts that triggered the court’s holding, you should first look at the court’s analysis of the issue later in

the opinion. What facts did the court rely on when it reached its holding about the element or factor you are examining? Those are the trigger facts.

Your case illustration may also need to include a fact because it is necessary for your reader to understand the trigger facts. These additional, contextual facts should be limited as much as possible. The more facts you add, the more difficult it will be for your reader to distinguish the important from the less important facts.

In the next example, 7.2-D, the trigger facts are shaded.

#### **Example 7.2-D • Trigger facts**

A person may reasonably believe his liberty has been restrained if a police officer blocks that person's car. *Wenger*, 922 P.2d at 1251. In *Wenger*, the defendant was intending to leave a parking lot when uniformed officers parked their patrol car and blocked in the defendant's car. *Id.* After noting that a stop occurs when an officer prevents a vehicle from being driven away, the court held that the defendant reasonably believed his liberty had been restrained. *Id.* at 1251-52.

Trigger facts

### **C. The Court's Holding**

The court's holding is another part of the case illustration. The holding describes the court's answer to one of the legal questions before it.

Remember that a single case may have many holdings. One case, for example, can have holdings about whether a person was "stopped," whether a person's "liberty was restrained," whether the person's belief that his liberty was restrained was "reasonable," and whether a person's car was "blocked." Explain the holding that is relevant to the legal idea you are illustrating. In [Example 7.2-E](#), the court's holding is shaded.

#### **Example 7.2-E • Court's holding**

A person may reasonably believe his liberty has been restrained if a police officer blocks a person's car. *Wenger*, 922 P.2d at 1251. In *Wenger*, the defendant was intending to leave a parking lot when uniformed officers parked their patrol car and blocked in the defendant's car. *Id.* After noting that a stop occurs when an officer prevents a vehicle from being driven away, the court held that the defendant reasonably believed his liberty had been restrained. *Id.* at 1251-52.

Court's holding

When writing your holding, you may sometimes want to consider the procedural posture of the court's decision, as in [Example 7.2-F](#). Because many cases you will cite are appellate cases, you may want to consider whether the court (1) affirmed (in other words, said "Trial court you got it right"), (2) reversed ("Trial court, you got it wrong"), or (3) reversed and remanded ("Trial court, you are wrong, and we are sending it back to you to fix it").

#### **Example 7.2-F • Case illustration includes procedural posture**

A police officer may request information without restraining a person's liberty. *State v. Gilmore*, 860 P.2d 882, 883 (Or. Ct. App. 1993). In *Gilmore*, an officer requested identification from three people who were sitting in a truck. *Id.* When the defendant opened the glove compartment to retrieve his identification, the officer saw a gun and arrested the defendant for illegal possession of a firearm. *Id.* Although the defendant argued he had been illegally stopped and, therefore, evidence of the gun should be excluded from trial, the trial court admitted the gun into evidence. *Id.* In upholding the trial court's decision, the Court of Appeals explained that, even if the defendant felt he was not free to leave, that belief was not objectively reasonable. *Id.* The Court of Appeals explained that, although the officer requested identification, the officer did not require the defendant to alter his course, nor did the officer prevent the defendant from leaving. *Id.*

Holding includes procedural posture

Including information about what the trial court did in your case illustration may depend on the point you are trying to convey. Although you may not always need this information,

sometimes explaining what the higher courts did with a lower court's decision, and why, can be valuable information to your reader.

#### **D. The Court's Reasoning**

The court's reasoning is its explanation of how existing law, when applied to the facts, led the court to its conclusion. Sometimes, the court explains its reasoning fully. For example, the court might explain how the legislature's intent is guiding the court's decision.

Other times, a court simply states the relevant facts and the conclusion that results from those facts. In that case, you may have no separate description of the court's reasoning. You may be limited to simply describing the trigger facts and stating the court's holding based on those facts.

If you have a good guess at why the court reached its conclusion but the court has not been explicit, you can explain that as well, but you must indicate that this reasoning is your guess based on information from the case.

In [Example 7.2-G](#), the court's reasoning is shaded.

##### **Example 7.2-G • Court's reasoning**

A person may reasonably believe his liberty has been restrained if a police officer blocks that person's car. *Wenger*, 922 P.2d at 1251-52. In *Wenger*, the defendant was intending to leave a parking lot when uniformed officers parked their patrol car and blocked in the defendant's car. *Id.* After noting that a stop occurs when an officer prevents a vehicle from being driven away, the court held that the defendant reasonably believed his liberty had been restrained. *Id.* at 1251.

Court's reasoning

#### **E. Order of the Parts**

Your case illustration will be easiest for the reader to absorb if written in this order: the hook, trigger facts, and then the reasoning and holding.

The hook appears first because it focuses the reader's attention. By telling the reader which legal idea the case will illustrate, the hook tells the reader what to look for in the case illustration and makes it easier for her to absorb the detailed facts that follow.

Although the hook may appear first, it is often written last. Remember, writing clarifies thoughts. As you flesh out your legal argument, you will likely clarify in your own mind the precise legal idea the case illustration represents. Additionally, a well-written hook creates flow between legal concepts. You may craft and re-craft the hook so that your reader can see the connection between a previous legal principle you illustrated and the current legal principle being illustrated. No matter when you actually write the hook, it should appear first in your case illustration.

Next, describe the trigger facts. The reasoning and holding will not make sense until you have described the facts on which both are based.

Finally, finish the illustration with the reasoning and holding. Whether you end with the reasoning or end with holding does not matter. Attorneys write their case illustrations both ways. As you can see in [Examples 7.2-H](#) and [7.2-I](#), both ways can be effective.

##### **Example 7.2-H • Holding is described after reasoning**

A person may reasonably believe his liberty has been restrained if a police officer blocks that person's car. *Wenger*, 922 P.2d at 1251-52. In *Wenger*, the defendant was intending to leave a parking lot when uniformed officers parked their patrol car and blocked in the defendant's car. *Id.* After noting that a stop occurs when an officer prevents a vehicle from being driven away, the court held that the defendant reasonably believed his liberty had been restrained. *Id.* at 1251.

Reasoning

Holding

##### **Example 7.2-I • Holding is described before reasoning**

A person may reasonably believe his liberty has been restrained if a police officer blocks that person's car. *Wenger*, 922 P.2d at 1251. In *State v. Wenger*, the defendant was intending to leave a parking lot when uniformed officers parked their car and blocked in the defendant's car. *Id.* The *Wenger* court held that the defendant reasonably believed his liberty had been restrained. *Id.* at 1251. The court reasoned that a stop occurs, and a person's liberty is restrained, whenever an officer prevents a vehicle from being driven away. *Id.* at 1251-52.

Holding

Reasoning

After describing the court's holding, you may realize that you've described the court's holding twice—once as your hook and once to explain how the facts and reasoning led the court to its conclusion. While not required, stating the court's holding twice is fine. A statement of the court's holding at the top and bottom of a case illustration creates effective bookends that reinforce the point of the case illustration.

To avoid sounding repetitious, be sure not to repeat the holding verbatim. Sometimes you can vary the two sentences by adding more specific ideas to the final description of the court's holding, perhaps drawing on the court's reasoning, as in [Example 7.2-J](#).

#### **Example 7.2-J • Holding creates bookends**

By contrast, in *Wenger*, the court held that the defendant reasonably believed his liberty had been restrained when officers blocked in the defendant's car. *Wenger*, 922 P.2d at 1251. In that case, the defendant was intending to leave a parking lot when uniformed officers parked their patrol car such that it blocked in the defendant's car. *Id.* at 1251-52. After noting that a stop occurs when an officer prevents a vehicle from being driven away, the court held that the defendant reasonably believed his liberty had been restrained. *Id.*

### **F. The Length of Case Illustrations**

Although all case illustrations typically include the same four components—a hook, the trigger facts, the court's holding, and the court's reasoning—case illustrations vary in length. Some case illustrations, like the ones above, take several sentences to illustrate a legal concept. Others, as in [Example 7.2-K](#), do the job in just one or two sentences. Still others require several paragraphs. The length of a case illustration depends on the legal principle the case is meant to illustrate, the information that needs to be included to illustrate that principle, and your ability to convey that information clearly and concisely.

#### **Example 7.2-K • Case illustrations in a sentence or two**

The first sentence is a rule that acts as the hook for the case illustration. The second sentence includes the trigger facts, the court's reasoning, and the holding.

A plaintiff is "closely related" to a victim if the plaintiff resides in the same household as the victim. *Thing v. La Chusa*, 771 P.2d 814, 815 n.10 (Cal. 1989). In one case, a court decided that a cousin who lived with the victim every other weekend and for one month during the summer "resided" with the victim and was, therefore, closely related. *Tonia v. Giers*, 834 P.2d 42, 44 (Cal. Ct. App. 1993).



### III. Determining Whether a Case Illustration Is Necessary

Not all explanations of the law require case illustrations. To determine whether a case illustration is necessary, review the purposes for a case illustration and determine whether any of those purposes will be served.

One purpose of a case illustration is to clarify how a rule works. Sometimes, however, a rule is so clear that no further image is necessary. For example, a bystander can recover damages after seeing an injury to someone else if she is “closely related” to the victim. One way a bystander can prove she is “closely related” is to prove that she is the “parent, sibling, child, or grandparent of the victim.” If your client is the daughter of the victim, you would not need to provide a case illustration for this rule. In explaining the law, you might state the rule expressed in [Example 7.2-L](#). The rule states that children are “closely related.” No case illustration is necessary for the reader to understand that a “daughter” is a “child.”

#### **Example 7.2-L • A rule that needs no case illustration**

A person is closely related if she is the parent, sibling, child, or grandparent of the victim.  
*Thing v. La Chusa*, 771 P.2d 814, 829 n.10 (Cal. 1989).

If, however, the rule is more ambiguous, you might need a case illustration. Another way a person can prove she is “closely related” is to prove she “resides in the same household” as the victim. Imagine that your client is the niece of the injured party and that she lives with her aunt when she is home from college. In that case, your argument would rest on whether your client “resides in the same household” as the victim. That language is not so clear. In that case, you would need case law to determine whether living in the victim’s home for only a few months a year establishes residency in that household. A case illustration, such as the one in [Example 7.2-K](#), would be the best way to clarify how the rule really works.

A second purpose for a case illustration is to prove the rule is as you have described it. In some instances, a legal citation alone can sufficiently prove the rule is as you have described it. A legal citation tells an attorney the authority for your assertion and how to find that authority if he doubts the assertion. Thus, if no other reason exists for providing a case illustration, consider whether a legal citation will provide all the proof you need that the rule you have asserted is true.

A final purpose for a case illustration is to foreshadow how a court will decide the same legal issue in your client’s case. If you have not relied on a case illustration when you apply the law to your client’s case, consider whether the case illustration is really necessary to help your reader understand the law that will be relevant to your client’s case.

In most instances, however, case illustrations are necessary to show how the rule functions. Omit them only when the rule standing alone is absolutely clear.

## IV. Using Case Illustrations

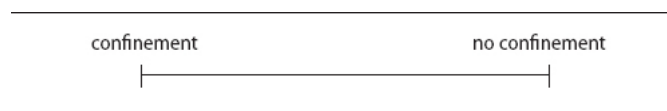
When case illustrations are necessary, you can use them in a variety of ways. For example, case illustrations can establish “parameters of behavior” within which your client’s conduct falls. A case illustration can also establish a “threshold of behavior” that your client’s conduct must meet to satisfy a standard.

### A. Parameters of Behavior

Case illustrations establish “parameters of behavior” by creating a spectrum of behavior within which a client’s conduct falls. On one end of the spectrum, one case illustration establishes conduct that did meet the standard. On the other end of the spectrum, another case illustration establishes conduct that did not meet the standard. In most legal issues, your client’s conduct will not clearly be on one side of the spectrum or the other. Instead, that conduct will likely fall somewhere in the middle.

For instance, let’s say your client wants to sue for the civil tort of false imprisonment. One element of that tort is whether the defendant “confined” a victim. Visually, that spectrum of behavior looks like [Figure 7.2-M](#).

**Figure 7.2-M • Spectrum of behavior**



By presenting a case illustration of each parameter, you can effectively convey the scope of the rule to your reader. How has the writer shown the scope of the rule in the following example, 7.2-N?

#### **Example 7.2-N • Case illustrations establish parameters of the rule**

**Conclusion** about the element

**Rules** begin here

In this case, our client was confined. “Confinement” occurs when the victim is significantly deprived of freedom or the victim’s personal liberty is obstructed for any length of time. *Garner v. State*, 500 S.W.2d 18, 20 (Tenn. Ct. App. 1997); *Cunningham*, 450 S.W.2d at 727.

A rule sets a parameter and acts as a hook for **case illustration 1**.

While a defendant need not physically restrain a victim, the objective evidence must indicate that the victim was not free to exit the situation. *Blackmon v. State*, 362 S.W.2d 701, 703 (Tenn. Ct. App. 1997). For example, in *Garner*, the defendant, an accountant, kept his secretary standing in the corner of his office by swinging an antique baseball bat at her when she moved. 500 S.W.2d at 20. Even though she was only five feet from the door, the court held the defendant had “confined” the victim because an objective review of the facts showed she was not able to exit the situation. *Id.*

A second rule sets another parameter and acts as a hook for **case illustration 2**.

On the other hand, a victim is not confined if the objective facts show the victim can freely leave. *Blackmon*, 362 S.W.2d at 703. In *Blackmon*, the defendant locked one of two doors to the warehouse loading area in which he and the victim were located. *Id.* Even though the defendant called the plaintiff his “prisoner” while blocking the front entrance, the victim admitted she could have probably left from the rear door. *Id.* at 703-04. Based on her admission, the court determined she could not have felt her liberty was significantly obstructed and, therefore, ruled she was not confined. *Id.*

By establishing parameters of behavior, you will fully explain to the reader how the rule applied in previous cases, and you will prepare your reader to understand where your client’s case falls within that spectrum.

### B. Threshold of Behavior

Sometimes courts have not adequately established a spectrum of behavior, perhaps because the issue is relatively new or maybe because the case law itself is sparse. If a spectrum does not exist, examine whether the courts have at least determined the minimum floor of conduct

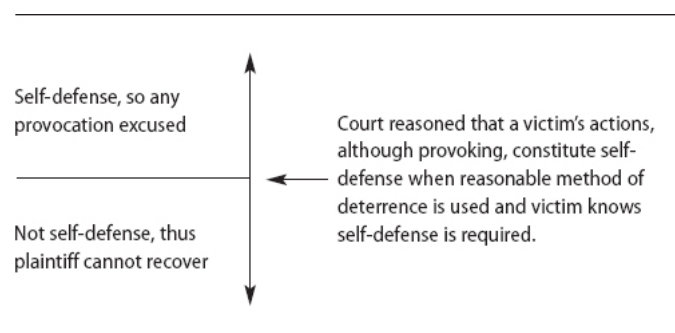
necessary to meet the standard in the rule. Then, you can explain the rule by showing the reader the “threshold of behavior” necessary to satisfy the standard.

For example, imagine your client is sued under the Illinois Animal Control Act, which imposes civil liability on an animal’s owner if the animal, without provocation, attacks a victim. Your client’s prized cat scratched and injured a guest at the client’s home. The guest claims the cat cornered her in the living room. The guest, believing the cat was about to attack, threw a decorative pillow at the cat. The cat then pounced on the guest, biting her arm and requiring the guest to get five stitches.

To recover under the Illinois statute, a plaintiff must prove that any provocation was in self-defense. Only one case in Illinois addresses the self-defense claim under the statute. Thus, although you cannot show a parameter of the rule in your case illustration, you can establish what threshold of behavior would satisfy the self-defense exception.

A diagram of that threshold of behavior may look like [Figure 7.2-O](#). Next look at [Example 7.2-P](#) to see how the writer explained the case illustration.

#### Example 7.2-O • Threshold of behavior



#### Example 7.2-P • Case illustration establishes threshold

Conclusion about the element  
Trigger facts and holding

Provocation will not be found when the victim acts in self-defense. *Steichman v. Hurst*, 275 N.E.2d 679, 681 (Ill. App. 2d Dist. 1996). In *Steichman*, a mail carrier was attacked on her daily route by a ten-pound dog she knew to be aggressive and that had harassed her on at least twelve occasions. *Id.* at 680. On the day of the incident, the dog was growling and barking at her, and the mail carrier sprayed it with an anti-attacking agent twice. *Id.* at 681. As she delivered the mail, the dog charged at her, and she again sprayed it. As the dog tried to bite her leg, the mail carrier fell and was injured. *Id.* The court held that the victim’s actions were not provocation. *Id.* The court characterized the victim’s actions as self-defense, not provocation, for two reasons: First, the victim knew that self-defense was required because the dog was known to be aggressive, had growled at her many times before, and was acting aggressively by growling and barking at her moments before the attack. *Id.* at 681-82. Second, she chose a reasonable method to deter the dog from attack by using a commercial agent that was specifically designed to deter animals, and she used the agent only after the dog acted aggressively.

Court establishes why this conduct meets self-defense, *i.e.*, the minimum threshold of behavior satisfying the self-defense rule.

The threshold of behavior is essentially one parameter of the rule. If case law establishes opposite parameters, illustrate both sides; otherwise, frame the illustration as a threshold of behavior so your reader can see the minimum level of conduct required to satisfy the rule.

As you develop more experience, you will see a variety of ways in which cases can illustrate rules. Using case illustrations to establish parameters of behavior or a threshold of behavior are two of the most common ways to illustrate a rule. Using either of these methods, however, requires you to choose the best cases to create parameters or establish a threshold.

## V. Choosing Prior Cases

While researching an issue, you may find many cases that effectively illustrate a rule. If you kept a case chart as you researched (see [Chapter 5](#), *Organizing Your Legal Authority*), you can quickly compare the cases you found. Still, how do you choose which cases to include in your explanation of the law? [Table 7.2-Q](#) provides guidelines.

**Table 7.2-Q • Guidelines for choosing cases to illustrate**

- **Choose cases from the governing jurisdiction.**
- **Choose factually analogous cases.**
- **Include both “good” and “bad” cases that are factually analogous.**
- **If two cases illustrate the same point, choose only one to discuss in a case illustration.**
- **Consider the date the case was decided.**
- **Do not include an illustration of a case just because you cited that case when you explained the rules.**

Let’s look at each of these guidelines more closely.

**Choose cases from the governing jurisdiction.** If the rule needs to be illustrated, first look for cases from within the jurisdiction that will be binding. Consider the hierarchy of courts, and prefer cases that are binding on the court that will be reviewing your client’s case. Supreme court opinions from the jurisdiction usually carry more weight than appellate or trial court decisions.

**Choose factually analogous cases.** From the cases that are binding, choose the case or cases that are most factually analogous to your client’s case. Be careful when you do this. Determining whether a case is factually analogous requires you to determine which facts were relevant to the prior court’s holding and then determine whether similar facts exist in your client’s case.

If you cannot find any factually analogous cases in your jurisdiction but you can find a factually analogous case from another jurisdiction, you may consider including that case in your explanation of the law, but you should acknowledge that the case is only persuasive authority. Remember, you should go to an outside jurisdiction only when you have a “gap” in your jurisdiction’s law or you are urging a change in the law. You should not jump to another jurisdiction without first addressing the relevant authority in your own jurisdiction.

**Include “good” and “bad” cases that are factually analogous.** Do not exclude a factually analogous case just because the court reached a holding that is bad for your client. Remember, your goal in writing an objective memo is to inform the attorney with whom you are working about the actual state of the law. Your office must advise your client in light of *all* the relevant law.

**If two cases illustrate the same point, choose only one to discuss in a case illustration.** The purpose of a case illustration is to show how a rule has been applied in the past and to prove your statement of the rule is accurate. You need to do that only once.

Some novice legal writers want to include all the relevant cases they have found to show that they have done thorough research and have carefully considered each case. Attorneys, however, prefer efficiency and do not want to spend time reading multiple cases that establish the same point. Consider [Example 7.2-A](#), the first example used in this section. Although many cases showed that a plaintiff can establish actual possession by building a fence and planting vegetation, the writer describes only one such case, the *Slak* case. Having once described that a fence and vegetation will establish actual possession, the writer need not make that point again by describing additional cases that make the same point.

(Notice the distinction in using one case to establish a point versus using two cases to establish parameters of the rule. When establishing parameters, the two cases have different holdings based on different fact patterns and, therefore, establish different—although related—points.)

**Consider the date the case was decided.** Although you will not likely decide to use a case solely because of the date it was decided, sometimes the date may play a part in your case selection. Older cases may be better for illustrating a longstanding rule. Newer cases may be better for illustrating the rule because those cases have not been eroded over time. Even though the factual similarity of a case to your client's case may be more important than the date, you can use the date as a factor in your choice.

**Do not include an illustration of a case just because you cited that case when you explained the rules.** Rules and case illustrations serve different functions. Rules describe generally how a court decides the presence or absence of an element or factor. When describing the rules, cite the cases that best describe the rules. A case illustration shows how those rules were applied in a factually analogous case. When choosing a case illustration, choose the case that best illustrates the rules, whether or not you cited that case when you described the rules.

## VI. Organize Around Legal Principles

At the beginning of this chapter, we pointed out that case illustrations represent legal principles. We have also explained that attorneys introduce case illustrations with a hook, which highlights the legal principle the case illustrates. If you do the same and introduce case illustrations with a hook, you will naturally organize your explanation of the law as an attorney should—around legal principles.

Too often, though, novice legal writers arrange their explanation of the law around cases, not legal principles. We call this arrangement the “case report model.” The case report model is ineffective because attorneys are ultimately interested in the legal principle that the case represents. Accordingly, case illustrations should be written and organized to bring out the legal principles.

To see the difference, compare [Examples 7.2-R](#) and [7.2-S](#).

### Example 7.2-R • Case illustrations organized around legal principles

In this case, our client was confined. “Confinement” occurs when the victim is significantly deprived of freedom or the victim’s personal liberty is obstructed for any length of time. *Garner v. State*, 500 S.W.2d 18, 20 (Tenn. Ct. App. 1997); *Cunningham*, 450 S.W.2d at 727.

The hook identifies the important legal principle.

While a defendant need not physically restrain a victim, the objective evidence must indicate that the victim was not free to exit the situation. *Blackmon v. State*, 362 S.W.2d 701, 703 (Tenn. Ct. App. 1997). For example, in *Garner*, the defendant, an accountant, kept his secretary standing in the corner of his office by swinging an antique baseball bat at her when she moved. *Garner*, 500 S.W.2d at 20. Even though she was only five feet from the door, the court held the defendant had “confined” the victim because an objective review of the facts showed she was not able to exit the situation. *Id.*

The hook identifies the important legal principle.

On the other hand, a victim is not confined if the objective facts show the victim can freely leave. *Blackmon*, 362 S.W.2d at 703. In *Blackmon* the defendant locked one of two doors to the warehouse loading area in which he and the victim were located. *Id.* Even though the defendant called the plaintiff his “prisoner” while blocking the front entrance, the victim admitted she could have probably left from the rear door. *Id.* at 703-04. Based on her admission, the court determined she could not have felt her liberty was significantly obstructed and, therefore, ruled she was not confined. *Id.*

### Example 7.2-S • A case report

In this case, our client was confined. “Confinement” occurs when the victim is significantly deprived of freedom or the victim’s personal liberty is obstructed for any length of time. *Garner v. State*, 500 S.W.2d 18, 20 (Tenn. Ct. App. 1997); *Cunningham*, 450 S.W.2d at 727.

The hook focuses on the date of the decision. A better hook would focus on a legal principle from *Garner* that will be applicable to the client’s case.

In 1997, the Tennessee Court of Appeals decided the *Garner* case. 500 S.W.2d at 20. In that case, *Garner*, the defendant, an accountant, kept his secretary standing in the corner of his office by swinging an antique baseball bat at her when she moved. *Id.* Even though she was only five feet from the door, the court held the defendant had “confined” the victim because an objective review of the facts showed she was not able to exit the situation. *Id.*

Again, the hook focuses on the date. A better hook would focus on a legal principle from *Blackmon* that will be relevant to the client’s case.

That same year, the Tennessee Court of Appeals also decided the *Blackmon* case. *Blackmon v. State*, 362 S.W.2d 701, 703 (Tenn. Ct. App. 1997). In *Blackmon* the defendant locked one of two doors to the warehouse loading area in which he and the victim were located. *Id.* Even though the defendant called the plaintiff his “prisoner” while blocking the front entrance, the victim admitted she could have probably left from the rear door. *Id.* at 703-04. Based on her admission, the court determined she could not have felt her liberty was significantly obstructed and, therefore, ruled she was not confined. *Id.*

In [Example 7.2-R](#), the first example above, the cases are organized around the parameters that establish when a person is confined. In other words, those cases are organized to show off

the legal principles defining when someone is confined. Notice that in [Example 7.2-R](#) each hook announces an important legal principle from the case law.

The next example, [Example 7.2-S](#), is a case report. It simply describes the cases, one after the next, without helping the reader to see the legal principle that each case represents. The case report model is ineffective because it forces the *reader* to do the hard work. It forces the reader to discern how the cases fit together in the body of law and what point each case is supposed to represent. Notice that in [Example 7.2-S](#), each hook simply names the case and date when the case was decided. Neither hook tells the reader why the case is important. As a result, the reader must discern how the cases fit together and work to find the most important information—the legal principle that the case represents.

Of the two, [Example 7.2-R](#), which is organized around legal principles, is more effective.

## VII. The Order of Case Illustrations

If you need more than one case to illustrate a rule—for instance, if you are establishing parameters—you will have to decide in what order to describe those cases.

Although two cases might be reasonably similar to your client's case, you may decide that one case is more similar to your client's case, and, as a result, a court would be more likely to follow the reasoning in that case. If so, describe first the case that is most likely to determine the outcome.

[Example 7.2-R](#) illustrates this choice. In that example the attorney concludes that the client can prove he was confined. The attorney, therefore, describes first the *Garner* case, a case in which the defendant *had* confined the victim. Doing so indicates that the attorney believes his client's case is more like the *Garner* case than like the *Blackmon* case, which is described second. And it indicates that the attorney believes that, due to the similarity, a court will reach the same outcome in his client's case as in the *Garner* case.

Some novice legal writers think that either chronological order (to show the historical development of the case law) or reverse chronological order (to show the most recently decided case) is a good way to organize. As we discussed above, that is not so. Instead, organize by legal relevance. Organizing by legal relevance gets the reader to the most important cases quickly. To see the difference between ordering by chronology and ordering by legal relevance, go back and review [Example 7.2-R](#) and compare it to the explanation in 7.2-S. Which is more effective?

Remember, attorneys want to know the law that will apply to a client's case today. Usually, they do not care about how the law became what it is today. (The historical development of a rule is sometimes relevant to more complex analyses—analyses you are unlikely to see at the beginning of your career.) Instead, base the order of cases on their legal relevance to the point you are trying to prove.



## VIII. Writing Case Illustrations

### • Crop your case illustrations carefully

The value of a case illustration is that it allows the reader to visualize how a rule or a group of rules was applied to real life facts. The picture is important. Just as a good photograph often focuses on one simple focal point, a good case illustration includes only those facts that are relevant to the court's holding.

In [Example 7.2-T](#), the case illustration is poorly cropped. The reader is forced to wade through details about the date and where the parking lot was located only to learn that those details (shaded) are not at all relevant to the holding. That unnecessary work is frustrating to the reader.

#### Example 7.2-T • Case illustration cropped poorly

In *Wenger*, on May 24, 1995, the defendant was parked in a parking lot at SE 67th and Foster. 922 P.2d at 1251. The defendant was about to leave the parking lot when officers parked their car in front of the defendant's car blocking in the defendant's car. *Id.* After noting that the Oregon Court of Appeals had previously held that a stop occurs when an officer prevents a vehicle from being driven away, the court held that because the officers blocked the defendant's exit, the defendant had been stopped. *Id.*

If a fact is described, the reader will assume that the fact is important and should be remembered. As a result, including non-critical facts creates problems. You will tax your reader as she struggles to determine whether each fact is actually important, and you will irritate your reader when she realizes that it is not. So, to the extent possible, include only those facts that are critical to a court's holding, as in [Example 7.2-U](#).

#### Example 7.2-U • Case illustration cropped well

In *Wenger*, the defendant was about to leave a parking lot when officers parked their car in front of the defendant's car blocking the car in the parking spot. *Id.* After noting that a stop occurs when an officer prevents a vehicle from being driven away, the court held that the defendant had been stopped because the officers blocked the defendant's exit. *Id.*

### • Be specific and concrete about trigger facts

Be detailed about facts that were critical to the court's holding. Details signal to the reader, "Hey! These are the important facts."

Details also allow the reader to visualize how the rule functioned in real life. To create that picture, you must be specific and detailed about the critical facts and the court's reasoning.

Compare [Examples 7.2-V](#) and [7.2-W](#) below. Both case illustrations do the job; however, in the first example, 7.2-V, the writer blurs his description of the plaintiff's testimony, a fact critical to the court's holding. [Example 7.2-W](#) is better because it allows us to actually hear the testimony that the court heard. In addition, because [Example 7.2-W](#) is more specific, we can better gauge how similar or distinct our case might be from the example.

#### Example 7.2-V • Trigger fact is blurred

In a case where the plaintiff seemed uncertain about the property line, the plaintiff was not able to rely on the pure mistake doctrine to prove her possession of the property was hostile to the owner's claim. *Fisher v. Dean*, 3 P.3d 212, 214 (Or. Ct. App. 2000).

#### Example 7.2-W • Trigger fact described specifically and concretely

In a case where a plaintiff testified, "I didn't know where the true property line was located," she was not able to rely on the pure mistake doctrine to prove her possession of the property was hostile to the owner's claim. *Fisher v. Dean*, 3 P.3d 212, 214 (Or. Ct. App. 2000).

### • Blur non-critical facts that are necessary to tell the story

Some non-critical facts, however, should be included because they are necessary to tell the story. For instance, in the case illustration above, (7.2-W), the writer describes the plaintiff's

testimony. Notice, though, that the writer does not refer to the plaintiff as Dorothy Engelson. The plaintiff's name was not relevant to the court's holding. So, the writer blurs that detail.

The level of detail about a fact signals its relative importance. If a fact is described very specifically and concretely, the reader will assume that the fact is important and should be remembered. By contrast, if the fact is not critical but needs to be included, generalize the fact so that it will assume less importance.

- **Describe facts in chronological order**

Readers assume that a story will be told in chronological order and naturally read with that expectation. When you describe the trigger facts in your case illustration, you are telling a story about what happened in that case. As your reader reads the facts in your case illustration, she will assume that the story will be told chronologically. If you tell the story non-chronologically, you are apt to confuse your reader and cause her to stumble over your writing.

- **Use the past tense**

Case illustrations describe events in the past and are, therefore, always written in past tense. (By contrast, rules, which describe ongoing, current legal principles, are described in the present tense.)

### Practice Points



- Case illustrations should identify a legal principle and allow the reader to visualize how that legal principle was applied to particular facts.
- Case illustrations have four parts: a hook, trigger facts, the court's holding, and the court's reasoning.
- The length and depth of case illustrations will vary.
- In choosing cases, you should consider whether the prior case is factually analogous, whether it illustrates a new idea, and whether it is from the governing jurisdiction.
- Organize your cases around currently applicable legal principles. Do not describe the historical evolution of those principles.

<sup>1</sup> Richard Neumann explains that case illustrations “prove the rule” in his text *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* 96 (Aspen L. & Bus. 2001).

## Section 7.3

# **Explaining the Law: Citing and Avoiding Plagiarism**

[I. Citing](#)

[II. Avoiding Plagiarism](#)

## I. Citing

A citation is a reference to a legal authority or other source.<sup>1</sup> As you explain the law, you will need to provide a citation for each legal proposition.

A citation is all the proof you need that the legal proposition you have stated is true. So, go ahead. Be bold! Tell the reader what the law is in your own words. Then cite it. If the reader doesn't believe you, the reader can use your citation to find the legal authority and check the law for herself.

Two manuals explain how to cite properly. Those are the *ALWD Citation Manual* and *The Bluebook*.<sup>2</sup> Because both explain proper citation form in detail, we will not do so here. Certain questions do, however, pop up on a regular basis. Here are some frequently asked questions and the answers we give.

### • When I'm explaining the law, do I need to cite every sentence?

Yes. When explaining the law, a good practice is to cite every sentence. Attorneys care about the law as it is expressed in statutes, case law, regulations, and legislative history, and they want to know where your explanation of the law came from. You will remove any question about the authority for your explanation of the law if you cite every sentence. Although not every individual or organization follows this rule, you can't go wrong with citing every sentence in the explanation of the law. *ALWD* Rule 43.2(a); *Bluebook* Intro. at 2.

### • Do any exceptions exist to the cite-every-sentence-in-your-explanation-of-the-law rule?

Yes. A few exceptions exist. First, you can't cite a negative. At some point, you might need to say, "No court has examined [insert the unexamined issue or fact pattern here]." When no court has examined something, you can't cite to it.

Second, sometimes when you write you may summarize more detailed information that follows. For example, you may write, "Plaintiffs in past cases have shown that they used the disputed land as an owner would in a variety of ways." Then, in the sentences that follow you will explain the several different ways, and those sentences will be cited. Because the sentences that support your summary are cited, you don't need to cite the summary ([Example 7.3-A](#)).

Third, if you are following the *ALWD* Manual, one rule permits writers to omit the citation when all the sentences in one paragraph come from the same page or section in the same source. *See* *ALWD* Rule 43.2(b). However, this exception is a narrow one, and as the *ALWD* Manual notes, "[s]ome individuals or organizations may prefer to place a citation after each sentence...." So, use this exception with care.

### Example 7.3-A • Summary of law is not cited because supporting sentences are cited

Plaintiffs in past cases have shown that they used the disputed land as an owner would in a variety of ways. In one case, the plaintiffs established that they used the disputed property as an owner would by showing that they used the disputed property as they did their adjoining land. *Davis v. Park*, 898 P.2d 804, 806-07 (Or. Ct. App. 1995). In another case, the plaintiffs built a fence and planted vegetation and, in that way, proved actual possession. *Slak v. Porter*, 875 P.2d 515, 518 (Or. Ct. App. 1994).

Please remember that these are very small, narrow exceptions to the cite-every-sentence-in-your-explanation-of-the-law rule. As a general rule, cite every sentence in your explanation of the law.

### • If several different cases state the same principle, do I cite to all of the cases?

No. When writing an objective memo, if several different cases make the same point, do not cite to all of them. Remember, the purpose of citing is to prove that the legal statement you just made is true. If the same legal principle is repeated over and over again in the case law, the legal principle is not controversial. Since no one is going to contradict a statement that is so often repeated, one citation to a case that states the legal principle will be sufficient to prove that what you have said is true. If you want to show that the citation represents one of many cases that establish the principle, you can insert the signal "e.g.," which means "for example." *ALWD* Rule 44.3; *Bluebook* Rules 1.2, B.3.4.

[Example 7.3-B](#) shows how to use the "e.g." signal.

### Example 7.3-B • The signal “e.g.”

Circumstantial evidence is admissible to establish a defendant’s intent to rob a bank. *E.g.*, *United States v. Buffington*, 815 F.2d 1292, 1302 (9th Cir. 1987).

#### • If several different cases state the same legal principle, how do I choose the case to cite?

Often an attorney will choose to cite the case that established the principle; a recent case or a case from the highest court, to show that the principle is still good law; or some combination. If you choose to cite to more than one authority, you will need to create a “string citation.” See below, [Example 7.3-C](#) and accompanying text, for a discussion about string cites.

But for an oft-repeated legal principle, it does not matter which case you choose. Just choose one.

#### • How do I cite to a synthesized legal principle?

When you derive a single legal principle from more than one legal source you will need to rely on a string citation. A “string citation” is simply a citation that refers to more than one resource. In a string citation, semi-colons separate the authorities. *ALWD* Rules 43.3(a), 45.2; *Bluebook* Rule 1.3.

If you go back to Section 7.1, *Rules*, to the discussion about synthesized rules, you will see that each synthesized rule uses a string cite to show the cases that support the synthesized rule. One of those synthesized rules is in [Example 7.3-C](#).

### Example 7.3-C • A synthesized rule is supported with a string cite.

A public accusation of socially unacceptable behavior is evidence of extreme and outrageous conduct. *See Woodruff v. Miller*, 307 S.E.2d 176, 178 (N.C. App. Ct. 1983); *West v. King’s Dep’t Store, Inc.*, 365 S.E.2d 621, 623-25 (N.C. 1988).

#### • What’s a parenthetical? How do I use it?

Attorneys include parentheticals to explain the relationship between the individual citation and the legal proposition in the text whenever the citation’s relevance might not otherwise be clear to the reader. *See ALWD* sidebar 46.1 (discussing explanatory parentheticals); *Bluebook* Rules 1.5, B4.1.5. In [Example 7.3-D](#), the explanatory parenthetical is shaded.

### Example 7.3-D • Parentheticals explain relevance of citations

The court held that the fence gave constructive notice even though the fence was not visible from the owners’ land because the plaintiffs and neighbors respected it as the boundary line. *Id.*; *see also Slak*, 875 P.2d at 518 (holding that a fence gave notice and describing it as the “classic example” of open and notorious use).

Be careful not to overuse parentheticals. Some novice attorneys will attempt to explain an entire case illustration in a parenthetical. To test whether you are using parentheticals well, read your paper with all the explanatory parentheticals removed. If your paper explains your legal argument clearly without the parentheticals, you are using parentheticals appropriately.

#### • How do I cite to a sentence that includes two legal principles from two different sources?

It depends. If you can separate the ideas into two sentences, do that and cite each one. If not, use “citation clauses.”

If you can separate the two legal principles into two sentences, you can use “citation sentences,” as in [Example 7.3-E](#). A citation sentence indicates that the entire prior sentence is supported by the citation that follows it. *ALWD* Rule 43.1(a); *Bluebook* Rules B2, 1.1(b)(i). The shaded citations in [Example 7.3-E](#) are referred to as citation “sentences” because the first letter of the citation is capitalized and the citation ends with a period, just like a sentence.

### Example 7.3-E • Citation sentences support two distinct ideas

If the encounter is “mere conversation,” then evidence acquired during the encounter is admissible against the defendant. *See, e.g., State v. Shelton*, 796 P.2d 390, 392 (Or. Ct. App. 1990). By contrast, if the encounter is a “stop,” then any evidence obtained during the encounter is admissible only if the stop is justified by reasonable suspicion. *Spensl*, 662 P.2d at 6.

If you cannot separate the two principles into two separate sentences, you will have to use citation clauses. Citation clauses are used to indicate that only a portion of the previous sentence is supported by the citation. *ALWD* Rule 43.1(b); *Bluebook* Rule 1.1(b)(ii), B2. In [Example 7.3-F](#), each citation clause is shaded. Notice that commas set off citation clauses, just like a clause in an ordinary sentence.

#### **Example 7.3-F • Citation clauses supporting two distinct ideas**

Although evidence acquired during “mere conversation” is not admissible against the defendant, *see, e.g., State v. Shelton*, 796 P.2d 390, 392 (Or. Ct. App. 1990), evidence acquired during a legal stop is, *Spent*, 662 P.2d at 6.

Citation clauses are set off by commas. Even the last citation has a comma before it, not a period.

If you use citation clauses, be sure that you use a comma just before the final citation and not a period. You can see that the final citation in [Example 7.3-F](#), *Spent*, has a comma before it and not a period. As we explained above, a period before the *Spent* citation would indicate that the *Spent* case supported the entire previous sentence. A comma before the *Spent* cite indicates that the *Spent* cite is a citation clause and supports only the phrase before it.

Although you may use citation clauses, try to avoid them whenever possible. A citation clause places a citation in the middle of your sentence and will disrupt its flow. Whenever possible, if two distinct legal concepts come from two different sources, separate out the legal concepts so that you can use citation sentences, as in [Example 7.3-E](#).

#### **• I want to cite a legal idea that I got from a case, but the case I read cites to another earlier case. Do I cite the case I read or the earlier case?**

Cite the case you read. Always. Ethical considerations require you to cite only those cases you have actually read. When you cite to a case, you are suggesting to your reader that you have read that case and you know what that case says. Moreover, it’s prudent lawyering to cite only those cases you have read. You don’t really know what a case says unless you go and read it. In sum, cite only cases you have read.

Of course, if the case you are reading incorporates an idea from an earlier case, that idea is now a part of the case you are reading, and you can cite to the case you are reading for that proposition.

If, however, the problem is that you simply want to cite the earlier case, the fix is easy: Go read the other case.

#### **• The case I have read quotes another case. How do I cite to a case that quotes an earlier case?**

This kind of citation is tricky. You can avoid the complicated citing by putting the quote into your own words, which will probably result in better writing.

If you really want to quote a case that is quoting another case, cite to the later case and in a parenthetical include a citation to the earlier case. Use double quotation marks around the words from the later case and single quotation marks around the quote from the earlier case, as in [Example 7.3-G](#). If you want to quote a quotation, be sure to first read *ALWD* Rule 47.7(c) or *Bluebook* Rule 1.6(c).

#### **Example 7.3-G • Quoting a quotation**

A victim is confined when the victim is significantly deprived of freedom or “the victim’s personal liberty is ‘obstructed for any length of time.’” *Garner v. State*, 500 S.W.2d 18, 20 (Tenn. Ct. App. 1997) (quoted in *Cunningham v. Richards*, 450 S.W.2d 724, 727 (Tenn. 1994)).

#### **• I have stated the case name in a textual sentence. Do I need to repeat the case name in the citation that follows?**

If you provide the case name in the textual sentence, you may omit the case name from a subsequent short citation. *ALWD* Rule 43.1; *Bluebook* Rules B4.2 and B5.2. [Example 7.3-H](#) shows a short citation in which the case name is included in the textual sentence but omitted from the citation.

#### **Example 7.3-H • A case name may be omitted in a short cite**

Circumstantial evidence is admissible to establish a defendant's intent to rob a bank. *E.g.*, *United States v. Buffington*, 815 F.2d 1292, 1302 (9th Cir. 1987). Testimony from co-conspirators is one type of circumstantial evidence that can establish a defendant's intent. *United States v. Snell*, 627 F.2d 186, 188 (9th Cir. 1984).

In *Buffington*, however, the Ninth Circuit held that the circumstantial evidence was insufficient to establish the defendant's guilt beyond a reasonable doubt. 815 F.2d at 1302.

Attorneys differ, however, about whether they will omit the case name from the first full citation to a case. If the full case name is provided in the textual sentence, the ALWD Manual permits you to omit the case name in the full citation that follows, as in [Example 7.3-I](#). ALWD Rule 43.1.

**Example 7.3-I • ALWD allows case name to be omitted in full citation if provided in the text**

Circumstantial evidence is admissible to establish a defendant's intent to rob a bank. *E.g.*, *United States v. Snell*, 627 F.2d 186, 188 (9th Cir. 1984). Testimony from co-conspirators is one type of circumstantial evidence that can establish a defendant's intent. *Id.*

In *Buffington v. United States*, however, the Ninth Circuit held that the circumstantial evidence was insufficient to establish the defendant's guilt beyond a reasonable doubt. 815 F.2d 1292, 1302 (9th Cir. 1987).

*The Bluebook*, however, requires that in a full cite the case name be immediately followed by the citation, as in [Example 7.3-J](#). Many attorneys believe that the embedded citation required by *The Bluebook* disrupts the flow of the text. Those attorneys will rewrite the sentence to avoid the embedded citation, as in 7.3-K.

**Example 7.3-J • The Bluebook requires citation to follow case name in a full cite**

Circumstantial evidence is admissible to establish a defendant's intent to rob a bank. *E.g.*, *United States v. Snell*, 627 F.2d 186, 188 (9th Cir. 1984). Testimony from co-conspirators is one type of circumstantial evidence that can establish a defendant's intent. *Id.*

In *Buffington v. United States*, 815 F.2d 1292, 1302 (9th Cir. 1987), however, the Ninth Circuit held that the circumstantial evidence was insufficient to establish the defendant's guilt beyond a reasonable doubt.

**Example 7.3-K • Attorneys revise to avoid embedded citations**

Circumstantial evidence is admissible to establish a defendant's intent to rob a bank. *E.g.*, *United States v. Snell*, 627 F.2d 186, 188 (9th Cir. 1984). Testimony from co-conspirators is one type of circumstantial evidence that can establish a defendant's intent. *Id.*

Circumstantial evidence will not, however, establish guilt in all cases. *Buffington v. United States*, 815 F.2d 1292, 1302 (9th Cir. 1987). In *Buffington*, for example, ...

Ultimately, a citation should allow your reader to quickly identify and, if necessary, retrieve an authority. The formats described above meet those goals. If, however, your law office prefers a particular format, follow the custom of your law office.

## II. Avoiding Plagiarism

A person plagiarizes by trying to pass off the words or ideas of another as one's own.

With proper citation, you need not be concerned about plagiarizing ideas from another authority. When you include a citation for every sentence in your explanation of the law, you are giving all the credit you need to for the legal ideas you are relying on.

Sometimes, though, a writer needs both a citation and quotation marks. Quotation marks signal that the writer has borrowed specific words and their unique sequencing. So, if you have appropriated not only a substantive idea, but also the unique sequencing of specific words, use quotation marks around the unique sequencing of specific words and a citation after the sentence.

As you read, you may notice that attorneys appropriate key legal phrases without providing quotation marks. For instance, an attorney might write that a police officer had “reasonable suspicion of criminal activity” without using quotation marks. The language (which is quoted in the previous sentence) is repeated so frequently that the language becomes, essentially, public language. By way of example, a quick search of federal cases showed that over the course of a year twenty-seven federal judicial opinions included that exact phrase, and none used quotation marks.

Pay attention to the cases you read. If a phrase repeats itself in many cases, you can likely use that phrase without quotation marks, but use a citation. The citation is necessary to show the source from which you drew the legal idea.

<sup>1</sup>. ALWD & Darby Dickerson, *ALWD Citation Manual: A Professional System of Citation* (4th ed. Wolters Kluwer 2010) (hereinafter *ALWD*).

<sup>2</sup>. *The Bluebook: A Uniform System of Citation* (Columbia L. Rev. Ass'n et al. eds., 19th ed. 2010) (hereinafter *Bluebook*).



## Chapter 8

# Applying the Law

[§8.1 Rule-based Reasoning](#)

[§8.2 Analogical Reasoning](#)

[§8.3 Counter-Analyses](#)

[§8.4 Organizing Your Application of the Law](#)

When you apply the law, you shift your argument to your client's case. Up until this point you have explained the law relevant to an element or factor within the governing rule. In explaining the law, you have chosen the law that will be relevant to determining whether that element or factor is present in your client's case. When you explained the law, however, you focused solely on the legal authority; neither your client nor any of your client's facts should have been mentioned in your explanation of the law.

Your client enters the picture when you apply the law. Applying the law requires you to compare and contrast the relevant law with the facts of your client's case to predict a particular outcome. An effective application connects the dots between the law you just explained and your conclusion about the element or factor being examined.

To support your conclusion, your application must examine both the strengths *and* weaknesses of your argument. By being explicit about how the law leads to an outcome and examining your argument's strengths and weaknesses, you will persuade the attorney reading your memo that your prediction is correct and well-founded in the law.

When you draft your application of the law, you will add no new legal information. All the law relevant to your client's case should have been presented first in the explanation of the law. In the application section, you apply that law to the facts in your client's case to show why a particular legal outcome is likely.

To effectively draft an application of the law, you will have to understand the tools attorneys use to connect the law to a predicted outcome and choose the most appropriate tool to use. Attorneys' tools include rule-based reasoning and analogical reasoning. Both of these tools can connect the law to your predicted outcome; however, each is better suited to some circumstances than to others.

In the sections ahead, we will discuss how to use these tools to apply the law to your client's case and the circumstances in which each tool works most effectively. We will also use these same tools to construct counter-analyses. Finally, we will discuss how to organize the application of the law.

## Section 8.1

# Applying the Law: Rule-Based Reasoning

### [I. When to Use a Rule-Based Argument](#)

### [II. Crafting a Rule-Based Argument](#)

The simplest analytical tool an attorney can use to predict an outcome is rule-based reasoning. When using rule-based reasoning to construct an argument, an attorney applies the language of a rule to a client's facts to predict an outcome.

[Example 8.1-A](#) illustrates rule-based reasoning by examining one element in a claim for negligent infliction of emotional distress. The short argument in [Example 8.1-A](#) addresses whether a boy, Jacob Tulchin, is sufficiently "closely related" to his biological mother, Addie Green, to recover for emotional damages after seeing her injured. The rule explains that a plaintiff is "closely related" if the plaintiff is the "child ... of the victim." The application of the law applies that rule and determines that the plaintiff is a "child" of the victim.

#### **Example 8.1-A • Rule-based argument**

Conclusion

Explanation of the law is one sentence: the relevant rule.

Jacob Tulchin is "closely related" to his birth mother, Addie Green. To be closely related, the plaintiff must reside in the same household or be the parent, sibling, **child**, or grandparent of the victim. *Thing v. La Chusa*, 771 P.2d 814, 830 n.10 (Cal. 1989). Although Jacob Tulchin did not grow up in the same household as Addie Green, because he is her biological **child**, he is closely related to her.

The application begins when the client is introduced. Although the explanation and application are in one paragraph, they are distinct sections. The application begins only after the explanation of the law is complete.

The final conclusion—that Jacob Tulchin will be considered closely related—is included in the same sentence that applies the law.

Rule-based reasoning is generally simple and straightforward, but you still need to know when to use this tool and how to use it well.

## **I. When to Use a Rule-Based Argument**

When you turn to your client's case, you will have to decide whether to use rule-based reasoning or analogical reasoning to support your legal argument. The difference between the two is that rule-based reasoning relies on the language of a rule or group of rules to predict an outcome. By contrast, analogical reasoning relies on a comparison to prior case law to make a prediction.

Attorneys usually choose rule-based reasoning in two circumstances. First, when a rule is so clear that its application raises no questions, attorneys do not want to waste a reader's time with a lengthy comparison to prior case law. Therefore, they construct a quick and simple rule-based argument.

Second, attorneys choose rule-based reasoning when no analogous case exists. For example, if a new statute has not been interpreted or not frequently applied, relevant case law may not exist. Even in an area with well-developed case law, you may occasionally find that no court has considered a fact pattern like your client's fact pattern. In those circumstances, attorneys will rely on rule-based reasoning to make a prediction.

To help you decide whether to choose rule-based reasoning or analogical reasoning, look back to your explanation of the law. As we explained in Section 7.2, *Case Illustrations*, you do not always need a case illustration in an explanation of the law. If you have decided a rule is so clear that it does not need a case illustration, then you have decided a rule-based argument will be effective. If, however, you have decided a case illustration is necessary to explain the reasoning, then you will typically need to use an analogical argument. Section 8.2 discusses how to craft an analogical argument. The remainder of this section discusses how to craft a rule-based argument.

## II. Crafting a Rule-Based Argument

While a rule-based argument is usually straightforward, crafting an effective one takes care. Two techniques will help:

- **Integrate key language from the rule into your analysis of your client's facts**

First, integrate the key language from the rule with your client's facts. Using language from the rule in your application will show how the law supports the outcome you have predicted.

In [Example 8.1-A](#), the word “child” is borrowed from the rule and integrated with the client's facts to show how the rule will likely apply to the client's case. The repetition of the word “child” allows the reader to see how the rule relates to the client's facts.

[Example 8.1-B](#) shows an application in which the language of the rule is *not* integrated with the client's facts. When you read [Example 8.1-B](#), you will see a slight gap in the logic that the reader must bridge.

### Example 8.1-B • Rule's language is not integrated into application

Jacob Tulchin is “closely related” to his birth mother, Addie Green. To be closely related, the plaintiff must reside in the same household or be the parent, sibling, **child**, or grandparent of the victim. *Thing v. La Chusa*, 771 P.2d 814, 830 n.10 (Cal. 1989). Although Jacob Tulchin did not grow up in the same household as Addie Green, because he is her **biological son**, he is closely related to her.

Although in [Example 8.1-B](#) the reader can see the link between the law and the conclusion, the link is less obvious. As the reader begins to consider how the law will apply to the client's facts, the reader must take the word “biological son” and search for the word in the rule to which it connects. Although that search may take only a moment, the reader must stop and do some work. Even a momentary struggle to find a connection will interrupt the flow and force of your argument. By integrating the exact language of the rule with your client's facts, your application will be fluid and easy to follow. Your reader will quickly connect the dots.

- **Be detailed about your client's facts**

The second technique to creating an effective rule-based application is describing the facts in your client's case concretely and in detail. Specific, concrete facts are your proof that a legal standard is met. As a junior attorney working for a more senior attorney, your job is to inventory all the facts that the senior attorney might rely on to build an argument, should this client's case ever be litigated. Doing so keeps the senior attorney fully informed and will instill confidence in your work product. Look at [Examples 8.1-C](#) and [8.1-D](#). Which will better prepare the senior attorney to represent the client?

### Example 8.1-C • Rule-based reasoning with generalized facts

Conclusion

Rule

Mr. Ciesick can prove the first element of a workers' compensation claim, that he subjectively believed his employer expected him to play in the company softball game. An employee can establish that he subjectively believed he was expected to engage in an off-duty recreational activity simply by stating, under oath, that that was his belief. *Aetna Cas. & Sur. Co. v. Workers' Comp. Apps. Bd.*, 232 Cal. Rptr. 257, 263 (Cal. App. 5th Dist. 1986).

Application begins when facts from client's case are introduced.

Although he has not yet been asked to do so, Mr. Ciesick would be able to testify to his belief that his employer expected him to play in the company softball game. His boss had told him that the softball games help build team spirit, and the company CEO had asked him why he had missed a game. Based on those exchanges, Mr. Ciesick can establish his belief that he was expected to play softball.

Writer sums up the facts. Thus, the reader's understanding of the facts supporting the conclusion is less precise.

### Example 8.1-D • Rule-based reasoning with specific, concrete facts

Conclusion

Rule

Mr. Ciesick can prove the first element of a workers' compensation claim, that he subjectively believed his employer expected him to play in the company softball game. An employee can establish that he subjectively believed he was expected to engage in an off-duty recreational activity simply by stating, under oath, that that was his belief. *Aetna Cas. & Sur. Co. v. Workers' Compn. Apps. Bd.*, 232 Cal. Rptr. 257, 263 (Cal. App. 5th Dist. 1986).

Application begins here when facts from client's case are introduced.

Although Mr. Ciesick has not yet been asked to do so, he would be able to testify to his belief that his employer expected him to play in the company softball game. In our interview with him, Mr. Ciesick stated that when he applied for his current position his future boss, Elizabeth Zimels, asked whether he played softball, and when Mr. Ciesick said that he did, his future boss responded "Good. That's how we build a team around here." When he missed one game, Louise Pearson, the company CEO e-mailed him to ask why he had missed the game and closed the e-mail by writing, "Don't let us down again." Accordingly, Mr. Ciesick would be able to testify under oath that he believed his employer expected him to play in the company softball game.

Specific facts keep the senior attorney fully informed and instill confidence in the novice attorney's work.

### Practice Points



- Use rule-based reasoning when the meaning of a rule is so clear that its application will raise no questions or when a comparison to a case illustration would not help explain how the rule applies in the client's case.
- In constructing a rule-based application, integrate key language from the rule with your client's facts so that you can show the reader how the rule supports the outcome you have predicted.
- In constructing a rule-based application, describe the facts from your client's case specifically and concretely to provide proof that the legal standard is met.

## Section 8.2

# Applying the Law: Analogical Reasoning

### [I. When to Use Analogical Reasoning](#)

### [II. How to Construct an Effective Analogy.](#)

#### [A. State Your Point](#)

#### [B. Construct Your Comparison or Distinction](#)

#### [C. Explain Why the Comparison Matters](#)

### [III. Using Analogical and Rule-Based Reasoning Together](#)

Analogical reasoning is perhaps the attorney's most valuable analytical tool. When an attorney argues by analogy, she is establishing that the client's case is similar enough to, or different enough from, a previous case that the outcome in the previous case should control the present case.

The frequency with which an attorney reasons by analogy reflects the value our legal system places on stare decisis. If an attorney can establish that a client's case is factually similar to a prior, mandatory case, a court will be bound by the prior decision, and the attorney can predict an outcome. Likewise, if an attorney can establish that a client's case is distinguishable from a prior, mandatory case, a court will not be bound by that decision. So, although certainty in the law is rare, a clear analogy or distinction to a precedential case makes predicting an outcome in your client's case easier.

## **I. When to Use Analogical Reasoning**

As we explained in Section 8.1, *Rule-Based Reasoning*, you will have to decide whether to use rule-based reasoning or analogical reasoning to support your legal argument. Between the two, attorneys most frequently choose to argue by analogy. Because analogical reasoning is powered by stare decisis and because stare decisis *requires* a court to reach a particular outcome, an analogical argument is most compelling to other attorneys. Although attorneys use rule-based reasoning when a rule is so clear its application raises no questions or when no analogous case exists, in most cases, a rule's application is not straightforward and relevant case law does exist. In those cases, argue by analogy.

Again, you can turn to your explanation of the law to help you decide whether to use analogical reasoning. If you need a case illustration to fully explain the law, you will need analogical reasoning to predict an outcome.

## II. How to Construct an Effective Analogy

To construct a great analogy, you must remember one basic premise: Show your work. Do not assume that your reader is so knowledgeable or a conclusion is so obvious that you need not explain the steps by which you reached your conclusion. No matter how experienced your reader, you must explain step by step how a similarity to or a distinction from a prior case leads to a particular outcome.

Remember, the way you have applied a prior case to your client's facts may not be the only interpretation, and without *explicitly* walking the reader through your analysis and showing how the precedent supports your conclusion, you cannot assume that your reader will come to the same conclusion. Analytical writing is thus a lot like doing a math problem: If you show each step of your analysis, you get credit. Otherwise, you do not.

Typically, an effective analogical argument has three components, as explained in [Table 8.2-A](#).

**Table 8.2-A • Components of an effective analogical argument**

1. **A sentence telling the reader the point the analysis will prove.**
2. **A fact comparison establishing a similarity to or distinction from a prior case.**
3. **An explanation of the legal consequence of the similarity or distinction. In other words, explain why the comparison matters.**

You can use the three components whether you are arguing that your client's case is similar to or distinguishable from a prior case. In [Example 8.2-B](#), an attorney uses the three components to argue that a prior case is similar, and therefore a similar outcome is warranted in the client's case. In the next example, [Example 8.2-C](#), an attorney uses those same three components to distinguish a prior case and argue that, therefore, the prior case does not control the outcome. Following the examples, we'll look at each component more closely.

### **Example 8.2-B • An analogical argument proves a legally significant similarity**

The point of the analysis.

Fact comparison establishes factual similarity.

The Neros can likely show constructive notice because they built a fence and planted vegetation. Like the fence in the *Davis* case, the Neros' fence marked the purported property line that was respected by the Neros and their neighbors. In addition, the Neros' fence was always visible from the western lot, even when they allowed the garden to return to its natural state. Because the non-visible fence in *Davis* provided constructive notice, the Neros' visible fence should provide notice, too.

The legal consequence of the similarity is explained.

### **Example 8.2-C • An analogical argument proves a legally significant distinction**

The point of the analysis.

Fact comparison shows a distinction.

Even though Officer Ephgrave's car did block Mr. Adams's car, a court is likely to distinguish Mr. Adams's case from the *Wenger* case. In the *Wenger* case, the court noted that the defendant was intending to leave at the time his car was blocked. By contrast, Mr. Adams told Officer Ephgrave that he was "going to sit a little while longer," suggesting that he was not intending to leave. Because he was not intending to leave, a court is less likely to conclude that Mr. Adams reasonably felt his liberty was restrained.

The legal consequence of the distinction is explained.

## **A. State Your Point**



The first sentence of an analogical argument should tell your reader the primary point the analogy will prove. Stating the point serves two purposes: First, it quickly establishes the bottom line. Legal reading is not like reading a mystery novel with a surprise ending. Attorneys are busy people. They want to know the outcome *now*. Second, readers absorb more details when they know where an argument is going. By stating the point first, readers will know as they read *why* the details matter.

One way to state the point of an analogy is to state whether the legal standard has been met and identify the prior case and key fact that led to that conclusion, as in [Example 8.2-D](#).

**Example 8.2-D • The point of the analogy identifies key fact, prior case law, and standard that is met**

The first sentence explains that the point of the analogy is to prove that, because of the fences in both cases, the client can establish the element at issue—constructive notice.

The Neros' fence is like the fence in *Davis* and will provide constructive notice. Like the *Davis* fence, the Neros' fence marked the purported property line that was respected by the Neros and their neighbors. In addition, the Neros' fence was always visible from the western lot, even when they allowed the garden to return to its natural state. Because the non-visible fence in *Davis* provided constructive notice, the Neros' visible fence should provide notice, too.

As your case comparisons become more complex, however, you may find it difficult to include all the information shown in [Example 8.2-D](#). In that case, you can simply scale back your first sentence.

For instance, you can state the point by concluding whether the standard has been met and identifying just the key fact that leads to that conclusion, as in [Example 8.2-E](#).

Finally, you can simply state whether a particular standard is met, as in [Example 8.2-F](#).

**Example 8.2-E • The point of the analogy identifies a key fact and standard that is met**

The first sentence explains that the point of the analogy is to prove a particular legal outcome. It also identifies the fact that will trigger the outcome.

The Neros can show constructive notice because they built a fence. Like the fence in the *Davis* case, the Neros' fence marked the purported property line that was respected by the Neros and their neighbors. In addition, the Neros' fence was always visible from the western lot, even when they allowed the garden to return to its natural state. Because the non-visible fence in *Davis* provided constructive notice, the Neros' visible fence should provide notice, too.

**Example 8.2-F • The point of the analogy identifies the element that is met**

The first sentence simply explains that the point of the analogy is to prove a particular legal outcome.

The Neros can show constructive notice. Like the fence in the *Davis* case, the Neros' fence marked the purported property line that was respected by the Neros and their neighbors. In addition, the Neros' fence was always visible from the western lot, even when they allowed the garden to return to its natural state. Because the non-visible fence in *Davis* provided constructive notice, the Neros' visible fence should provide notice, too.

All of the examples showing how to state your point are effective. The difference lies in how much information each communicates. Choosing how much information to include is a judgment call. Typically, a reader can easily absorb between twenty and twenty-five words per sentence, so you will have to balance the information you would like to convey against your reader's ability to absorb it and draft accordingly.

## **B. Construct Your Comparison or Distinction**

Establishing that your case is factually similar to or distinguishable from a prior case is the heart of a case comparison; it determines whether *stare decisis* will apply to control a legal outcome. Constructing an effective factual comparison requires both analytical precision and organized writing.

These five pointers will help you create an effective factual comparison: (1) Determine which facts make your client's case similar to or distinguishable from the prior case; (2) describe the facts from your client's case in concrete detail; (3) determine the depth of detail

necessary to describe the facts from the prior case, and describe those; (4) introduce no new information about the prior case; and (5) help your reader see the comparison.

## 1. Determine which facts make your client's case similar to or different from the prior case

To determine which facts make your client's case similar to or distinguishable from a prior case, you must review the legally significant facts in both the prior case and your client's case. Begin by reviewing your case illustration to see the trigger facts and reasoning that you said led a prior court to its conclusion. Then, review your client's case. Determine which facts in your client's case are similar to or distinguishable from the trigger facts that led the prior court to its conclusion. You will likely find that some of your client's facts are similar to the facts in the prior case and some of your client's facts are distinguishable.

Now, you must decide. On balance, are the facts in your client's case sufficiently similar to the trigger facts in the prior case? Or, are the facts in your client's case, on balance, distinguishable from the trigger facts in the prior case?

### Sidebar

All cases differ factually in some ways. When analogizing cases, focus on the legally significant facts in the precedential case—those that triggered an outcome in the prior case. Look to see whether your client's case includes facts that are similar to the trigger facts in the precedential case.

If you decide that your client's case is more like than unlike the precedent case, you will rely on those similar facts to make an analogy and argue that a similar outcome should result. Your analogy will focus on only those facts that are similar to the trigger facts in the precedent case. If additional facts in your client's case would also contribute to the same outcome but were not considered by the court in the prior case, incorporate those into your argument, but do so after you have constructed your comparison showing a similarity.

If you decide that your client's case is not like the precedent case, you will rely on the facts that establish a difference to distinguish your client's case from the prior case and argue that the prior case should not be followed. Your comparison will rely on only those facts that suggest the cases are distinguishable.

Whether you decide that your case is similar to or distinct from the prior case, a few facts may weigh in the opposite direction. For the moment, put those facts aside. You will address them in a separate counter-analysis (Section 8.3, *Counter-Analyses*).

Now that you have determined whether your client's case is similar to or distinct from a prior case and identified the facts on which that comparison will be built, you will begin constructing your fact-to-fact comparison.

## 2. Describe facts from your client's case in concrete detail

When constructing a case comparison, you should *always* describe facts about your client's case. Your description of your client's facts is your reader's chance to visualize how the law applies to your client. For your reader to clearly see how the law acts upon your client, you must describe the facts of your client's case specifically and concretely.

Compare [Examples 8.2-G](#) and [8.2-H](#). In each, the facts of the prior case are in bold and the facts of the client's case are shaded. Can you see the difference between a comparison that uses concrete details and one that does not?

### Example 8.2-G • Client's facts described in a generalized way

Point of the analysis.

Facts of the prior case are compared to client's facts to establish a similarity.

Legal consequence of similarity is explained.

Gabrielle Lafille will probably be able to prove she was “then aware” of her husband's accident. Her situation is similar to the situation in *Krouse*. **In *Krouse*, a husband knew where his wife was standing and heard and felt the impact of the accident come from that location.** Similarly, in our client's case, Ms. Lafille could perceive the accident even though she did not see it. Because the *Krouse* court determined that the plaintiff was then aware, a court should also determine that Ms. Lafille was then aware.

### Example 8.2-H • Client's facts described specifically and concretely

Facts of the prior case are compared to client's facts to establish a similarity.

Gabrielle Lafille will probably be able to prove she was “then aware” of her husband’s accident. Her situation is similar to the situation in *Krouse*. **In *Krouse*, a husband knew where his wife was standing and heard and felt the impact of the accident come from that location.** Similarly, in our client’s case, Ms. Lafille knew her husband was just around the bend in the road and heard the sounds of the accident, come from that location. Because the *Krouse* court determined that the plaintiff was then aware, a court should also determine that Ms. Lafille was then aware.

### 3. Determine the trigger facts from the prior case that need to be recalled

Although the facts of your client’s case *must* be described as specifically and concretely as possible, you will have to judge the appropriate depth of detail with which to describe facts from the prior case.

The facts from the prior case may not need to be described in as much detail because you will have already described those facts in a previous case illustration. Thus, the depth of detail with which you describe facts from the prior case will depend on your assessment of your reader’s ability to remember your earlier description.

Whether your reader can remember the details about the prior case will depend on the distance between your case illustration and the point in your application when you apply it. The more space between description and comparison, the less likely your reader is to remember the details and the more important it will be to remind your reader of them so the reader can see the exact comparison that you do.

[Examples 8.2-I](#) and [8.2-J](#) show how as the space between the case illustration and your comparison to it increases, so does the depth of detail. If your case comparison directly follows your description of the case illustration, your reader will recall the case illustration, and you can construct your comparison with a less explicit reference to facts from the prior case, as in [Example 8.2-I](#).

### Example 8.2-I • Case illustration immediately followed by application: reader can see comparison with few details from prior case

One circumstance under which a person may reasonably believe his liberty has been restrained is if a police officer blocks a person’s car. *Wenger*, 922 P. 2d at 97. In *Wenger*, the defendant was about to leave a parking lot when officers parked their car blocking the defendant’s car. *Id.* at 96-97. The *Wenger* court held that the defendant had been stopped because the officers blocked the defendant’s exit. *Id.* at 97. The court reasoned that a stop occurs whenever an officer prevents a vehicle from being driven away. *Id.*

Explanation of the law provides case illustration of the *Wenger* case.

Comparison established without any description of the facts in *Wenger*.

The writer judges that due to the proximity of the case illustration and the simplicity of the case, the reader can remember the facts from *Wenger* that make the cases similar.

In this case, Paul Adams could not reasonably believe that his liberty was being restrained because his exit was not blocked. Unlike the defendant in *Wenger*, Mr. Adams was not prevented from leaving when the officers blocked his car. Although Officer Ephgrave blocked Mr. Adams’s car, Officer Ephgrave asked Mr. Adams if he was planning to leave. Mr. Adams said he was not. In addition, Officer Ephgrave said that he would move his car if Mr. Adams wanted to leave. Thus, although the court in *Wenger* determined that the defendant reasonably felt his liberty was restrained when the officer blocked his car, Mr. Adams will probably not be able to prove that he felt his liberty was restrained when Officer Ephgrave parked behind his car.

If, however, your explanation of the law is more complex and involves more cases illustrations, your comparison to any one case will necessarily be further from your initial description of it. In that case, you need to refresh your reader’s memory so that she can see the same comparison that you do. You can do so by explaining the facts from the prior case in more detail, as in [Example 8.2-J](#).

### Example 8.2-J • Application does not immediately follow case illustration: trigger facts from prior case described in more detail

#### First case illustration

One circumstance under which a person may reasonably believe his liberty has been restrained is if a police officer blocks a person's car. *Wenger*, 922 P. 2d at 97. In *Wenger*, the defendant was about to leave a parking lot when officers parked their car blocking the defendant's car. *Id.* at 96-97. The *Wenger* court held that the defendant had been stopped because the officers blocked the defendant's exit. *Id.* at 97. The court reasoned that a stop occurs whenever an officer prevents a vehicle from being driven away. *Id.*

#### Second case illustration (drawn from same case)

In addition, a person may reasonably believe his liberty has been restrained if a police officer alters that person's course of conduct. *Id.* at 97. In *Wenger*, the undercover officer identified himself as an officer and then later placed his hand on the defendant's shoulder and directed the defendant away to question him. *Id.* The court noted that a stop may also occur when an officer requires a defendant to alter his course. *Id.* The court held that the officer's actions of placing his hand on the defendant's shoulder and directing the defendant away also supported the trial court's conclusion that a stop had occurred. *Id.*

Facts from prior case described in more detail because writer judges that due to the space between the initial description of the facts and the comparison, the reader will need a more specific reminder to be able to see the similarity between the two cases.

In this case, Paul Adams could not reasonably believe that his liberty was being restrained. First, his exit was not blocked. While the defendant in *Wenger* was prevented from leaving when the officers blocked his car, Officer Ephgrave did not prevent Mr. Adams from leaving, despite blocking Mr. Adams's car. Officer Ephgrave asked Mr. Adams if he was planning to leave. Mr. Adams said he was not. In addition, Officer Ephgrave said that he would move his car if Mr. Adams wanted to leave. Thus, although the court in *Wenger* determined that the defendant reasonably felt his liberty was restrained when the officer blocked his car, Mr. Adams will probably not be able to prove that he felt his liberty was restrained when Officer Ephgrave parked behind his car.

If in doubt about how much detail to include, err on the side of caution and add more detail. Analogies that seem obvious to you may not be obvious to your reader. If more detail might clarify the analogy and make less work for your reader, include it.

### 4. Introduce no new information about the prior case in your analogy

Attorneys expect the explanation of the law to set forth all of the law relevant to analyzing an element or a factor. So, if you did a good job in your explanation of the law, all the information about the prior case relevant to analyzing an element or factor has already been explained and cited, and you will not surprise or confuse your reader by introducing a new fact or additional details from the prior case in the application section. In addition, because all the prior case law should have been cited in the explanation, you do not usually need to provide cites to precedent when you are applying the law.

### 5. Help your reader see the comparison

After you identify the trigger facts in both your client's case and the prior case that you want to compare, you must help your reader see the similarity or distinction that you do. Often, two facts may seem so patently similar that no explanation is necessary. Usually, that is not so. Rarely are the facts of a current case identical to the facts of a prior case. When a difference exists, you need to help your reader see why, despite that difference, the facts are analytically equivalent.

You can do this by using one or more of the following techniques: bringing your facts together, stating explicitly why facts are similar or distinguishable, using parallel structure, and comparing facts only to facts.

One way to help your reader see the analytical equivalence between two sets of facts is to simply write the facts so that the facts are physically close to each other on the piece of paper. Compare [Examples 8.2-K](#) and [8.2-L](#). In both examples, the facts from the prior case are in bold, and the facts from the client's case are in gray. In [Example 8.2-K](#), the facts are far apart. In [Example 8.2-L](#), the facts are brought together. Can you see how the proximity helps the reader see the similarity?

#### Example 8.2-K • Distance makes comparison more difficult to see

The Neros can prove that they had actual possession of their land because they used the disputed property in a manner that an owner would. **The plaintiffs in *Slak* showed actual possession by building a fence and planting vegetation.** Based on those facts, the court determined that the Slaks had established actual possession. In our client's case, the Neros should also be able to show actual possession because they built a fence, kept a garden, and maintained an orchard.

#### Example 8.2-L • Proximity makes comparison easier to see

The Neros can prove that they had actual possession of their land because they used the disputed property in a manner that an owner would. Like **the plaintiffs in *Slak* who built a fence and planted vegetation**, the Neros built a fence, kept a garden, and maintained an orchard. Therefore, like the plaintiffs in *Slak*, the Neros should be able to prove actual possession.

Although proximity will help, proximity by itself will not always draw out the similarity between facts. In [Example 8.2-M](#), can you see how, despite the proximity of the facts, the similarity is more difficult to see?

#### Example 8.2-M • Similarity not explained despite proximity

The Neros can prove that they had actual possession of their land because they used the disputed property in a manner that an owner would. **The plaintiffs in *Slak* built a fence and planted vegetation.** The Neros kept a garden, maintained an orchard, and built a fence. Therefore, like the plaintiffs in *Slak*, the Neros should be able to prove actual possession.

#### • State explicitly why facts are similar or distinguishable

Another way to help your reader see a similarity or distinction is to state the similarity or distinction overtly. Read examples 8.2-N and 8.2-O. Does the overt explanation of why the cases are similar help the reader understand the analysis?

#### Example 8.2-N • Fact comparison without an overt statement of the similarity

Facts of the prior case are compared to client's facts to establish a similarity.

Ms. Gabrielle Lafille will probably be able to prove she was "then aware" of her husband's accident. **In *Krouse*, a husband knew where his wife was standing and heard and felt the impact of the accident come from that location.** Similarly, in our case, Ms. Lafille knew her husband was just around the bend in the road and heard the sounds of the accident, come from that location. Since the *Krouse* court determined that the plaintiff was then aware, a court should also determine that Ms. Lafille was then aware.

#### Example 8.2-O • Fact comparison supported by overt statement of the similarity

Overt statement of similarity

Ms. Gabrielle Lafille will probably be able to prove she was "then aware" of her husband's accident. Her situation is similar to the situation in *Krouse*. In both cases the family member could perceive the injury to the victim at the time of the accident, even though the family member could not see the accident occur. **In *Krouse*, a husband knew where his wife was standing and heard and felt the impact of the accident come from that location.** Similarly, in our case, Ms. Lafille knew her husband was just around the bend in the road and heard the sounds of the accident come from that location. Since the *Krouse* court determined that the plaintiff was then aware, a court should also determine that Ms. Lafille was then aware.

Facts compared

Legal consequence of similarity explained

The overt statement (underlined) is simply a statement that is true about both cases. Similarly, you can overtly state a distinction, as in [Example 8.2-P](#).

#### Example 8.2-P • Distinction stated overtly

Overt statement of distinction that will be proven is underlined.

In this case, Paul Adams could not reasonably believe that his liberty was being restrained. First, his exit was not blocked. **While the defendant in *Wenger* was prevented from leaving**

when the officers blocked his car, Officer Ephgrave did not prevent Mr. Adams from leaving, despite blocking Mr. Adams's car. Officer Ephgrave asked Mr. Adams if he was planning to leave. Mr. Adams said he was not. In addition, Officer Ephgrave said that he would move his car if Mr. Adams wanted to leave. Thus, although the court in *Wenger* determined that the defendant reasonably felt his liberty was restrained when the officer blocked his car, Mr. Adams will probably not be able to prove that he felt his liberty was restrained when Officer Ephgrave parked behind his car.

#### • Use parallel structure

Using a parallel structure can also help your reader see the similarity and distinctions that you do. Sentences are “parallel” when they use the same grammatical structure. Parallelism helps show relatedness of ideas.

In [Example 8.2-Q](#), the comparison uses parallel structure to help the reader see the similarity between two cases. The same ideas labeled 1, 2, and 3 are used to describe both the prior case and the client's case. The writer also sequences the ideas in the same order and uses the same language to further emphasize the similarities between the cases.

#### Example 8.2-Q • Parallel structure reinforces similarity

The Neros can prove that they had actual possession of their land because they used the disputed property in a manner that an owner would. [1] Like the plaintiffs in *Slak* who [2] showed actual possession by [3] building a fence and planting vegetation, [1] the Neros should also be able to [2] show actual possession because they [3] built a fence, kept a garden, and maintained an orchard.

1. Parties identified
2. Holding explained
3. Facts on which holding is based explained

The repetitive structure subtly reinforces that the two cases are similar. Look what happens in [Example 8.2-R](#) when parallel structure is not used: the ideas become difficult to follow.

#### Example 8.2-R • Ideas more difficult to follow when you don't use a parallel structure to reinforce similarity

The Neros can prove that they had actual possession of their land because they used the disputed property in a manner that an owner would. [1] Like the plaintiffs in *Slak* who [2] showed actual possession by [3] building a fence and planting vegetation, [1] the Neros [3] built a fence, kept a garden, and maintained an orchard and should, therefore, also [2] be able to prove actual possession.

1. Parties identified
2. Holding explained
3. Facts on which holding is based explained

Notice how 2 and 3 are in a different order in the two halves of the comparison.

The beauty of parallel structure is that, typically, your reader is not particularly aware of the parallelism or its influence; however, by using the same language in the same pattern to describe two distinct cases you will subtly lead your reader to the conclusion that the two cases are really the same.

Parallel structure can also be used to emphasize a distinction, as in [Example 8.2-S](#).

#### Example 8.2-S • Parallel structure used to emphasize distinction

The Neros' claim is distinguishable from the claim in *Hoffman*. Where [1] the plaintiffs in *Hoffman* could not prove hostility because [2] they had not built the fence and [3] the fence did not run along the border of their property, [1] the Neros [2] built their fence, and [3] they built it along the northwest border of their property. Based on these differences, a court should not follow the *Hoffman* case.

1. Parties identified
2. Similar fact 1
3. Similar fact 2

The description of the holding is not in parallel structure, which is appropriate because the writer is asserting that the holdings differ.



A parallel structure can also be used with other techniques. In [Example 8.2-T](#), the writer states the similarity overtly and then uses a parallel structure to draw out the similarity to a prior case. Can you see how the ideas listed below are described for each case in the same order?

**Example 8.2-T • Overt statement of similarity, facts in close proximity, and parallel structure establish similarity**

Fact comparison begins with an overt statement of the similarity, then facts in close proximity and in parallel structure.

Mr. Morgan will probably not be able to prove he was “then aware” of his mother’s accident. His situation is similar to the situation in *Fife*. In both cases, the plaintiffs discovered that a family member was injured a few moments after the accident occurred. [1] *In Fife*, [2] **after hearing the sounds of a car crash, [3] the plaintiffs had to climb a fence before they could discover that a family member was injured.** Similarly, [1] in our case, [2] after hearing the sounds of an accident, [3] Mr. Morgan had to run around a bus before he discovered that his mother had been injured. In *Fife*, the seconds delay meant that the plaintiffs were not then aware. Because Mr. Morgan was also delayed in learning that his mother was injured, a court should also hold that Mr. Morgan was not then aware.

Legal consequence of similarity explained.

**• Compare like items**

When structuring your comparison, make sure that you are comparing like items. For example, you should compare a case to a case and a fact to a fact. Do not compare a fact to a case name, as in [Example 8.2-U](#).<sup>1</sup>

**Example 8.2-U • Comparing apples to oranges**

Like *Pankrantz*, Daniel enticed the spouse by sending her cards and letters.

The writer does not mean that the defendant, Daniel, is like the *Pankrantz* case.<sup>2</sup> Rather, he means to say that the defendant Daniel is like the defendant in the *Pankrantz* case, as in [Example 8.2-V](#). Be precise about the facts you are comparing.

**Example 8.2-V • Comparing apples to apples**

Like the defendant in *Pankrantz* who frequently plied the wife with phone calls and flowers, Russell enticed the spouse by sending her cards and letters.

**C. Explain Why the Comparison Matters**

After every comparison you write, your reader will have one question: “So, what?” Your supervising attorney will want to know exactly what the comparison means to the client’s case. Thus, after you have helped your reader to see the analogy that you do, you must also concretely and unequivocally explain to the reader why that comparison is important. Giving a great comparison without explaining its legal significance is like stealing the basketball then missing the lay up. In either situation, you score no points for the hard work you have put in.

In [Examples 8.2-B](#), [8.2-C](#), [8.2-G](#), [8.2-O](#), and [8.2-T](#) above, we used arrows to show where the writer explained the significance of the comparison. Go back and look at those examples. Can you see how the writer has, in each instance, explained why the comparisons are significant? In doing so the writer explains “so what” and completes the analogy.

### III. Using Analogical and Rule-Based Reasoning Together

Although analogical and rule-based reasoning are two different tools, they can be used within the same argument. Doing so draws on the strengths of each.

The great strength of a rule-based argument is that it is simple. It draws on only the facts of your client's case and the language of the rule. Such an argument focuses the reader's attention on the most important aspects of your analysis—your client and the principles of law. Such an argument is simple and straightforward. Analogical reasoning, although more complex than rule-based reasoning, draws on *stare decisis* and therefore creates a more powerful argument.

You can, however, draw on the strengths of both by using analogical reasoning to support a rule-based argument. You can see this approach in [Example 8.2-W](#). In that example, the writer begins with a rule-based argument. Doing so presents the argument simply and directly. That argument is then supported by analogies to prior case law. Can you see both tools at work in the example?

#### Example 8.2-W • Rule-based and analogical reasoning used to support argument

Conclusion

Rules are explained first. Notice how the shaded language is integrated into the rule-based application below.

The Neros will very likely be able to prove their hostility to other claims of ownership through the doctrine of “pure mistake.” Under the doctrine of pure mistake, they can prove their hostility through evidence that they honestly believed they owned the disputed property. *Hoffman*, 994 P.2d at 110 n.4. A “pure” mistaken belief is one without conscious doubt. *Faulconer*, 964 P.2d at 252. If plaintiffs are aware that they may not own the disputed land, conscious doubt exists, and the plaintiffs cannot prove hostility by “pure mistake.” *Id.*

Then, two cases—*Davis* and *Mid-Valley*—illustrate the parameters of the rule.

In *Davis*, the plaintiffs proved pure mistake by establishing that they had walked the fence line before buying the land, and as a result, they honestly and reasonably believed the fence line to be the property boundary. 898 P.2d at 805, 806. However, in a case where a plaintiff testified that “she was in doubt as to the location of the true [property] line,” she was not able to rely on the pure mistake doctrine to prove her possession of the property was hostile to the owner's claim. *Mid-Valley Resources*, 13 P.3d at 122.

The application of the law begins here. This first part uses **rule-based reasoning**. It applies the language of the rules to the client's facts.

The Neros will be able to prove that they honestly believed that they owned the disputed property and, therefore, that their use was “hostile.” The Neros toured the property before making the purchase and believed from the statements of the realtor that their property line was different from where it actually was. In addition, the Neros did not have any conscious doubts regarding their belief. In explaining her problem, Mrs. Nero exclaimed, “[T]hat's part of our land!” She was convinced that the disputed property belongs to her and her husband and unaware of any alternative claims. Thus, the Neros are like the plaintiffs in *Davis* who toured the property and had an honest and reasonable belief that the fence was the property line and unlike the plaintiffs in *Mid-Valley* who were in doubt as to the location of the property line. Accordingly, the Neros should be able to prove their hostility through pure mistake.

To support the rule-based reasoning, above, the writer does two quick **comparisons**. The comparisons can be quick because the client's facts have already been described in the first part of the application.

The same argument can, however, be presented through analogical reasoning alone, as in [Example 8.2-X](#).

#### Example 8.2-X • The same argument presented through analogies

Analogy 1 (to *Davis*)

Analogy 2 (to *Mid-Valley*)

The Neros will be able to prove that they honestly believed that they owned the disputed property and, therefore, that their use was hostile. The Neros, like the plaintiffs in *Davis*, toured the property before making the purchase and believed from the statements of the realtor that their property line was different from where it actually was. The Neros also did not have any doubts regarding their belief, unlike the plaintiff who testified in *Mid-Valley Resources*. In explaining her problem, Mrs. Nero exclaimed, “[T]hat's part of our land!” She seemed



convinced that the disputed property belongs to her and her husband. The Neros made a reasonable and honest mistake regarding the boundary line; therefore, the Neros should be able to prove that, by pure mistake, their possession of the land was hostile.

The argument that relies on both rule-based and analogical reasoning ([Example 8.2-W](#)) is not stronger or weaker than the argument that relies on analogical reasoning ([Example 8.2-X](#)). Both are strong because both are supported by stare decisis.

Because both present strong arguments, you can decide which format to use based on what will work best in a given context. Consider the legal authorities you are working with, the facts of your client's case, and the preferences of your reader. Then experiment with each form to decide which format will present your argument most effectively.

### Practice Points



- An effective analogical argument should contain a point sentence, a fact-to-fact comparison or distinction, and an explanation of the legal consequence.
- When constructing a fact-to-fact comparison, use specific, concrete facts from the prior case and from your client's case.
- To help your reader see the comparisons or distinctions, you can bring the facts from both cases close together, explicitly state the comparison, and use a parallel sentence structure.
- An effective legal analysis may be constructed with rule-based reasoning, analogical reasoning, or a combination of both. You will use analogical reasoning when a direct application of the rule alone would not be clear or no applicable case law exists.

<sup>1</sup> The “apples to oranges” analogy in [Example 8.2-U](#) is taken from Alan L. Dworsky, *The Little Book on Legal Writing* 62 (Fred B. Rothman & Co. 1992).

<sup>2</sup> The authors would like to thank Professors Laura Graham and Luellen Curry of Wake Forest University School of Law who developed the alienation of affection memo problems and materials from which this example and some examples in [Chapter 13](#), *Questions Presented and Brief Answer*, are based.

## Section 8.3

### **Applying the Law: Counter-Analyses**

[I. The Role of a Counter-Analysis](#)

[II. Crafting a Counter-Analysis](#)

[A. Explain the Opposing Argument](#)

[B. Explain Why a Court is Unlikely to Adopt the Opposing Argument](#)

[C. Return to Your Initial Conclusion](#)

[III. When to Include a Counter-Analysis](#)

[IV. Where to Include a Counter-Analysis](#)

[V. The Counter-Analysis and Your Explanation of the Law](#)

## **I. The Role of a Counter-Analysis**

To develop a thorough legal argument you must keep an old adage in mind: “Every story has two sides.”

When you initially apply the law to your client’s facts, you address only one side of the story. That application of the law sets forth the argument you believe a court is most likely to adopt, and you temporarily ignore any alternative perspective that might lead to a different outcome.

The counter-analysis, on the other hand, considers the alternative perspective. It brings to light interpretations of fact and law that might result in an outcome different from the one you predicted.

The purpose of providing a counter-analysis is to explain the best opposing arguments to the attorneys with whom you are working. By understanding the strongest arguments on either side of an issue, attorneys can properly plan their strategy, whether that strategy is to continue litigation or to seek a settlement.

## II. Crafting a Counter-Analysis

An effective counter-analysis should do three things: First, a counter-analysis must explain the opposing argument. Then, it must explain why a court is less likely to adopt that analysis. Finally, the counter-analysis must return to your initial conclusion so that the reader has no doubt as to what you believe is the most likely outcome to the argument. The rest of this section explains each of those steps in turn.

### A. Explain the Opposing Argument

To explain the opposing argument effectively, you will need to first imagine what the opposing argument might be. Opposing arguments usually develop because people can reasonably differ about how to understand the facts of a case, the law, or how the law applies to the facts. You should consider these possible different interpretations to evaluate whether viable opposing arguments exist.

Once you have identified one or more viable opposing arguments, then you must provide sufficient information for the senior attorney to see why the opposing argument is viable. You will, therefore, need to flesh out the opposing argument in the same way you fleshed out your primary argument. Doing so will allow your reader to see the opposing argument in its full strength.

[Example 8.3-A](#) shows how you can use the same skills to present both your primary analysis and your counter-analysis. In [Example 8.3-A](#), the writer considers whether Mr. Bigelow can sue his friend, Mr. Theoroc, after Mr. Bigelow was injured when he was about to board Mr. Theoroc's raft for a weekend rafting trip.

#### Example 8.3-A • Explaining the opposing argument

A court will likely dismiss Mr. Bigelow's suit against our client, Sam Theoroc. A guest being transported without payment is barred from bringing an action for damages against the owner or operator of a watercraft, unless the accident is caused by gross negligence, reckless disregard, or intoxication. Or. Rev. Stat. §30.115 (2001). The policy behind the statute is to protect a host from liability when offering transportation to another in a spirit of hospitality. *Jewett v. Kosydar*, 512 P.2d 995, 997 (Or. 1973). Mr. Bigelow has not alleged that there was payment or that Mr. Theoroc was grossly negligent, reckless, or intoxicated. Therefore, the only question is whether Mr. Bigelow was being "transported" at the time of the accident.

Beginning of legal argument about "transportation."

Mr. Theoroc has a strong argument that Mr. Bigelow was being "transported" at the time of his accident. In determining when transportation begins, courts have relied on the underlying policy of the statute, which is to limit actions against a host. *See e.g., Jewett*, 512 P.2d at 996-97. Thus, "transportation" begins as soon as the gratuitous undertaking has begun, which is when the plaintiff is in the process of entering the vehicle. *Kruse v. Fitzpatrick*, 563 P.2d 680, 682 (Or. 1997).

The plaintiff need not be wholly within the vehicle for the transportation to have begun. *Jewett*, 512 P.2d at 996-97. For example, in *Jewett*, the plaintiff had put one foot into a car when the driver's foot slipped off the brake. *Id.* The car jumped forward, and the plaintiff was injured. *Id.* Although the plaintiff was not wholly within the vehicle at the time of the injury, the court reasoned that because the plaintiff had taken a step into the car, the gratuitous undertaking had begun. *Id.* Because the gratuitous undertaking had begun, the plaintiff was being transported at the time of the injury and was, therefore, barred from making a claim. *Id.* In reaching this conclusion, the court noted that the purpose of the statute was to protect from liability "one who, in a spirit of hospitality, offers transportation to another." *Id.* at 997.

On the other hand, transportation has not begun if a plaintiff has not yet made voluntary contact with the vehicle. In *Kruse*, the plaintiff was walking in front of a car and heading toward the passenger door. *Kruse*, 563 P.2d at 683. The driver's foot slipped off the brake, and the car struck the plaintiff. *Id.* at 682. The court reasoned that because the plaintiff had not made voluntary contact with the car prior to the injury and was still able to change her mind about whether to be transported, she was not in the process of entering the car and the gratuitous undertaking had not begun. *Id.* at 683. She was, therefore, not yet being transported and was not barred from bringing a claim. *Id.*

Application addressing whether Mr. Bigelow was "transported" begins here.

The application begins with the author’s primary analysis—the analysis the writer believes the court will adopt.

Mr. Theoroc can establish that Mr. Bigelow was being transported at the time he was injured. [1] This case is similar to the *Jewett* case. [2] Just as the gratuitous undertaking in *Jewett* had begun when the plaintiff was stepping into the car, here a court is likely to conclude that the gratuitous undertaking had begun because Mr. Bigelow was stepping into the raft. [3] If the court concludes that the gratuitous undertaking had begun, Mr. Bigelow, like the plaintiff in *Jewett*, will be barred from bringing a claim against Mr. Theoroc.

After explaining the primary analysis, the writer explains the counter-analysis.

Notice that the primary analysis (the comparison to *Jewett*) and the counter-analysis (the comparison to *Kruse*) use the same structure to flesh out the argument for the senior attorney.

Each argument (1) states the point of the comparison, (2) establishes a factual similarity, and (3) explains the consequence of the similarity.

[1] Mr. Bigelow will, however, argue that he was injured before he made contact with the raft, and therefore, transportation had not begun. [2] Specifically, Mr. Bigelow will point out that he was injured because the raft moved away from the dock. Thus, he never actually entered, or even made contact with, the raft. Based on these facts, Mr. Bigelow will argue that he is like the plaintiff in the *Kruse* case who never actually entered the car but was struck by the car while passing in front of it. In both cases, the plaintiff made no voluntary contact with the vehicle. [3] Therefore, Mr. Bigelow will argue, he, like the plaintiff in *Kruse*, should be permitted to bring suit.

Mr. Bigelow’s argument has two significant weaknesses. First, his case is factually distinct from *Kruse*. The *Kruse* plaintiff was injured in front of a car, and she could have changed her mind about the transportation before entering the car. Mr. Bigelow, however, was injured while stepping off of the dock; he was not in a position to change his mind about entering the raft. Whether the plaintiff had an opportunity to change her mind was at the crux of the *Kruse* court’s decision. Therefore, Mr. Bigelow’s ability to change his mind should lead a court to a different conclusion.

After explaining both analyses, the writer explains two reasons why the court will ultimately adopt the primary analysis.

In addition, allowing Mr. Bigelow’s claim to proceed to trial would run counter to the policy behind the statute. As mentioned above, this state’s courts have consistently stated that the purpose of the statute is to protect hosts who have offered hospitality. Relying on that policy, the courts have construed the statute to limit suits against hosts who have offered hospitality. Thus, if a court must choose between construing the statute to allow Mr. Bigelow’s claim to proceed, or to construe the statute to protect a host who has offered hospitality, a court is likely to protect the host and dismiss the suit.

The writer returns to the ultimate conclusion.

Accordingly, a court is likely to conclude that Mr. Bigelow was not being transported at the time of his accident and that, therefore, he cannot bring a claim against Mr. Theoroc.

Notice that in [Example 8.3-A](#) the primary analysis and the counter-analysis use the same structure to flesh out the argument. Both analogical arguments (1) state the point of the analysis, (2) establish a similarity, and (3) state the legal consequence. The same structure is used because the counter-analysis should be fleshed out as thoroughly as the primary analysis. Only by fleshing out each argument can the senior attorney truly understand and compare the strength of each argument.

[Example 8.3-B](#) provides another example of a counter-analysis. In that example, the issue is whether a falafel stand is a “building” under the terms of the deed restriction. That example presents two possible counter-analyses, one of which relies on a rule-based argument and the other of which relies on an analogical argument. Again, look to see how the same skills that would be used to build a primary analysis are used to build the counter-analysis.

### **Example 8.3-B • Another explanation of the opposing argument**

A court is unlikely to hold that the deed restriction, which prohibits our client, Ms. Izaguirre, from “build[ing] any building on” the property, also prohibits our client’s falafel stand. When construing a deed restriction, the language of a restriction is given its “ordinary and common” meaning. *Corley v. Olsson*, 134 S.E.2d 45, 48 (Fla. 2003). However, when in doubt as to the meaning of a restriction, the restriction is narrowly construed such that doubts are resolved “in favor of the free use of the land.” *Id.* This state has not interpreted the noun “building” or the verb “to build” in the context of a deed restriction. However, given the common and ordinary

meaning of the words and the policy to construe deed restrictions narrowly, a court is likely to permit the falafel stand on the property.

This paragraph is a single legal argument that uses rule-based reasoning. The argument does not include a counter-analysis because the writer did not believe there was any worthwhile counter-analysis.

First, Ms. Izaguirre did not “build” the falafel stand on the property. “To build” means “to construct.” *State v. Ahuja*, 56 S.E.2d 142, 144 (Fla. 2d Dist. App. 1988) (relying on *Webster’s Third New International Dictionary* 292 (1971)). In this case, Ms. Izaguirre built the falafel stand at her home and towed the stand to its current site. Thus, Ms. Izaguirre did not “build” the falafel stand on the site. For that reason alone, the falafel stand does not violate the deed restriction.

A second legal argument begins here.

In addition, the falafel stand is not a “building.” A “building” is “a constructed edifice “designed to stand more or less permanently ... [and] intended for use in one place.” *Id.* In this case, the wheels can be added or removed from the falafel stand. To get the falafel stand to its current site, wheels were attached and the falafel stand was towed. At the site, the wheels were removed, but they can be replaced, which would allow the falafel stand to be towed away. Thus, the falafel stand is not “designed to stand more or less permanently” nor is it “intended for use in one place.”

The primary analysis uses rule-based reasoning. Note how it re-uses key aspects of the rule to help the reader see how the facts compare to the rule.

The counter-analyses begin here. The writer believes that two counter-analyses may exist.

The first counter-analysis uses rule-based reasoning. Note again how language from the rule is incorporated so that the reader can see how the facts compare to the rule.

The neighbors may make one of two arguments. First, the neighbors may argue that the falafel stand is “designed to stand more or less permanently” and is “intended for use in one place.” They will point out that the wheels have, in fact, been removed. In addition, plumbing and electricity now run to the falafel stand. Finally, the falafel stand is now surrounded by a parking curb and two triangular-shaped planting areas. The neighbors will argue that these improvements are permanent and make what might have once been a movable stand a permanent building, which violates the terms of the deed.

The improvements, however, do not make the falafel stand permanent or intended for use in one place. The electricity and plumbing can be quickly disconnected and, once the wheels are re-attached, the cart can be towed across the planted areas to the street and driven away. Based on these facts and because deed restrictions are interpreted in favor of the free use of the land, a court should conclude that the falafel stand is not a building, which would allow the owners to use their land more freely.

The second counter-analysis relies on an analogical argument between this case and the *Charnelton* case. Note that it explains the factual similarity and then the legal consequence of that similarity, just as you would in any other analogical argument.

Second, the neighbors may attempt to rely on *Charnelton v. Harris* to argue that the falafel stand is a temporary building and, therefore, violates the deed. In *Charnelton*, 52 S.E.2d 27 (Fla. 3d Dist. App. 1984), the court concluded that a porta-potty violated a deed restriction. The deed restriction stated: “No temporary house, and no temporary building, shack, church, mobile or trailer home or tent shall be erected or placed on any lot.” *Id.* at 28. The court reasoned that the porta-potty, which could be moved on and off the site, was a temporary storage building and, therefore, violated the deed. *Id.* at 30. The neighbors may argue that just as a movable porta-potty can be a “building,” so too can a movable falafel stand be considered a “building.” Based on that analogy, the neighbors may argue that the falafel stand is a building and it violates the deed restriction.

The *Charnelton* case is not, however, an appropriate precedent for this case. In the *Charnelton* case, the deed restricted “temporary” buildings. The word “temporary” changes the common understanding of the word “building” by doing away with the idea that a “building” stands “more or less permanently.” Because the *Charnelton* deed addressed only “temporary buildings” and the deed in this case addresses “buildings” the *Charnelton* case is inapt.

Accordingly, a court should still conclude the falafel stand is not a building and, therefore, does not violate the deed restriction.

The above examples, [Examples 8.3-A](#) and [8.3-B](#), demonstrate how the same skills that you use to explain and flesh out your primary analysis should be used to explain and flesh out your counter-analysis. Explaining the counter-analysis is, however, only the first step.

## B. Explain Why a Court is Unlikely to Adopt the Opposing Argument

After explaining the opposing argument, you must then explain why a court is less likely to adopt it, or conversely, why a court is more likely to adopt the primary analysis.

To do so, you cannot merely repeat your primary analysis. (But it was so good! If I repeat it, surely the senior attorney will see why that analysis must win.) Instead of repeating the same analysis, you must step back and consider how a decision about this one legal argument would fit within the broad sweep of the law—just as a judge would.

At the beginning of your legal career, you may find it difficult to step back from your analysis and consider it as a judge would. However, judges routinely ask certain questions when weighing opposing arguments. Considering these questions may help you determine how a judge will decide between two competing, but valid, arguments. Ask yourself these questions:

- Does the counter-analysis rely on the kind of facts that have been persuasive to prior courts?
- Does it rely on mandatory, mainstream authority or does it rely on an outlying statement of the law?
- Is the outcome advocated in the counter-analysis consistent with the policy behind the law?
- Is the outcome advocated in the counter-analysis consistent with the recent trend of decisions?
- Is the outcome advocated in the counter-analysis a just outcome?
- If the counter-analysis were accepted, does it create a workable rule for future cases?
- If the counter-analysis were accepted, does it create a rule that the courts could easily administer?

In [Example 8.3-A](#) above (a part of which is repeated here as [Example 8.3-C](#)), you can see how asking the above questions can lead to an explanation of why a court is more likely to adopt the primary analysis. In [Example 8.3-C](#), the writer gives two reasons why the court is more likely to adopt the primary analysis. The writer notes, first, that the counter-analysis does not, in fact, rely on the same facts that were important to the *Jewett* court. Second, the writer notes that the counter-analysis advocates an outcome that would run counter to the policy behind the statute and, therefore, be inconsistent with the recent trend of cases. Those explanations address several questions a court is likely to ask as it weighs competing arguments: Which analysis is consistent with prior law? Which analysis relies on the kinds of facts that courts have relied on in the past? Which analysis results in an outcome that is consistent with the policy behind the law?

### Example 8.3-C • Explaining why the opposing argument is unlikely to succeed

Mr. Bigelow's argument has two significant weaknesses. First, his case is factually distinguishable from *Kruse*. The *Kruse* plaintiff was injured in front of a car, and she could have changed her mind about transportation before entering the car. Mr. Bigelow, however, was injured while stepping off of the dock; he was not in a position to change his mind about entering the raft. Whether the plaintiff had an opportunity to change her mind was at the crux of the *Kruse* court's decision. Therefore, Mr. Bigelow's ability to change his mind should lead a court to a different conclusion.

Explaining that the opposing argument does not rely on the kinds of facts that were important to the prior court.

Explaining that the outcome proposed in the opposing argument would run counter to the policy behind the statute and would be inconsistent with the trend of cases.

In addition, allowing Mr. Bigelow's claim to proceed to trial would run counter to the policy behind the statute. As mentioned above, this state's courts have consistently stated that the purpose of the statute is to protect hosts who have offered hospitality. Relying on that policy, the courts have construed the statute to limit suits against hosts who have offered hospitality. Thus, if a court must choose between construing the statute to allow Mr. Bigelow's claim to proceed, or to construe the statute to protect a host who has offered hospitality, a court is likely to protect the host and dismiss the suit.

Accordingly, a court is likely to conclude that Mr. Bigelow was not being transported at the time of his accident and that, therefore, he cannot bring a claim against Mr. Theoroc.



Because stepping back from two opposing arguments and assessing why a judge might favor one argument over another is difficult to do, we recommend that you look at as many examples as possible. For example, if you return to [Example 8.3-B](#) (a part of which is reproduced below in Example, 8.3-D), you can see another example of how an attorney explains why the counter-analyses are less likely to succeed. In that example, the attorney explains that the opposing interpretation would be inconsistent with the court's typical policy relating to restrictive deeds. The attorney makes that point because, as mentioned above, one of the questions judges will ask is whether a particular outcome would be consistent with policies behind the law.

#### **Example 8.3-D • Explaining why the opposing argument is unlikely to succeed**

The neighbors may make one of two arguments. First, the neighbors may argue that the falafel stand is “designed to stand more or less permanently” and is “intended for use in one place.” They will point out that the wheels have, in fact, been removed. In addition, plumbing and electricity now run to the falafel stand. Finally, the falafel stand is now surrounded by a parking curb and two triangular-shaped planting areas. The neighbors will argue that these improvements are permanent and make what might have once been a movable stand a permanent building, which violates the terms of the deed.

Explaining why the first opposing argument is likely to fail.

The improvements, however, do not make the falafel stand permanent or intended for use in one place. The electricity and plumbing can be quickly disconnected and, once the wheels are re-attached, the cart can be towed across the planted areas to the street and driven away. Based on these facts and because deed restrictions are interpreted in favor of the free use of the land, a court should conclude that the falafel stand is not a building, which would allow the owners to use their land more freely.

Now, try one on your own. Look at the second-to-last paragraph in [Example 8.3-B](#). That paragraph explains why a second opposing argument will fail. In particular, the paragraph identifies a problem that the opposing argument would raise in a judge's mind. What is that problem?

Remember, judges want to reach decisions that are consistent with prior case law, that won't be overturned, and that make sense for future parties. Once you have identified the problem that a counter-analysis would cause for a judge, you can explain why the judge will choose your primary argument over the opposing argument.

### **C. Return to Your Initial Conclusion**

Finally, after you have explained why the counter-analysis is unlikely to succeed, you must return to your ultimate conclusion so that the reader has no doubt as to what you believe is the most likely outcome to the argument. Usually, this return is just one sentence. Often the ultimate conclusion will flow naturally from your explanation about why the counter-analysis is weak and may even be the final sentence in that explanation.

[Example 8.3-E](#) highlights the final conclusion of the counter-analysis that you first saw, above, in [Example 8.3-A](#).

#### **Example 8.3-E • Return to your ultimate conclusion**

Accordingly, a court is likely to conclude that Mr. Bigelow was not being transported at the time of his accident and that, therefore, he cannot bring a claim against Mr. Theoroc.

[Example 8.3-F](#) highlights the final conclusion of the counter-analysis that you first saw, above, in [Example 8.3-B](#).

#### **Example 8.3-F • Return to your ultimate conclusion**

Accordingly, a court should still conclude the falafel stand is not a building and, therefore, does not violate the deed restriction.

The above discussion describes how to build an effective counter-analysis. You may, however, be wondering whether every legal argument must include a counter-analysis. The answer is “no.”



### III. When to Include a Counter-Analysis

Although every story has two sides, the strength and credibility of the other side varies. Sometimes the other side of the story is compelling; sometimes, it's just a story. So, too, with counter-analyses.

Although you should *always* consider whether a counter-analysis exists, sometimes no compelling alternative analysis of the law is present. In that situation, your application needs to provide a legal argument to explain why the outcome is clear; however, you will not need to explore any counter-analysis.

Finally, you may at times note a weakness, but that weakness does not warrant a full counter-analysis. For example, sometimes nearly all of the facts point to one legal conclusion, but one or two facts do not support that conclusion. You may want to point out those one or two facts even though those one or two facts do not really support a full counter-analysis. In such a case, consider using a dependent clause rather than a full counter-analysis. [Example 8.3-G](#) illustrates how you might dismiss a weakness in a dependent clause.

#### Example 8.3-G • A dependent clause acknowledges and dismisses a weakness

Next, the Neros will be able to prove that their possession of the property was exclusive. To prove exclusivity, plaintiffs need prove only that they used the land as an owner would use the land. *Hoffman*, 994 P.2d at 110. “Actual physical exclusion of all others is not required”; plaintiffs must merely prove “use consistent with ownership.” *Slak*, 875 P.2d at 519. The Neros can easily prove that they used the property exclusively. Although the Neros permitted neighbors to harvest and keep some of the garden’s vegetables, exercising the right to grant neighbors permission to take some of the vegetables shows use characteristic of an owner, which shows exclusive possession. Additionally, as discussed above, the Neros kept a garden, maintained an orchard and built a fence, just as landowners in semi-rural Oregon often do. Accordingly, they can prove they used the property as an owner would and that their use was exclusive.

“Although the Neros permitted neighbors to harvest and keep some of the garden’s vegetables,” is a dependent clause that acknowledges a factual weakness. The writer includes it at the outset of the application.

When using a dependent clause to dismiss a weakness, be certain that the weakness will be fully understood with just that one clause. The purpose of an objective memo is to allow the reader to fully see the strengths and the weaknesses in an argument. If a dependent clause will not allow a reader to fully understand the implications of a weakness, you will need to develop a full counter-analysis.

Moreover, you should generally use only one dependent clause. If you try to use more than one dependent clause to explain away a series of weaknesses, your analysis will read like a ping-pong match, moving back and forth between strengths and weaknesses.

[Example 8.3-H](#) shows you what that ping-pong match might look like. In [Example 8.3-H](#), all the weak facts are shaded.

#### Example 8.3-H • A ping-pong match between weak and strong facts

The falafel stand is not a building. Although wheels are not currently attached to the stand, wheels can be added or removed. Moreover, although electricity and plumbing are attached to the building, those systems can be easily disconnected. Finally, although there is a curb and plantings, those features also do not inhibit the falafel stand from being moved. Once the wheels are re-attached and the systems disconnected, the cart can be towed across the planted areas to the street and driven away. Thus, the falafel stand is not “designed to stand more or less permanently” nor is it “intended for use in one place.” Accordingly, a court should conclude that the falafel stand is not a building, which would allow the owners to use their land more freely.

If you find that you need more than one sentence to address the weaknesses in your prediction, it is probably best to gather those weaknesses together and address them in a full counter-analysis, using the three-part structure described above. You can see how an argument with too many dependent clauses can be improved by comparing the [Example 8.3-H](#), above, with [Example 8.3-B](#).

If ever you are in doubt as to whether an opposing analysis warrants a full counter-analysis, include the full counter-analysis. Your supervising attorney is relying on you to keep her informed about the possible viable alternative arguments. She would rather be over-informed and told about a weak counter-analysis than be under-informed and surprised by an alternative analysis at a later date.

## **V. Where to Include a Counter-Analysis**

Counter-analyses will always be explained at the end of the application section. Attorneys expect to see your strongest analysis first. So, describe first the analysis that you think will ultimately prevail. Then, explain the counter-analysis and why, ultimately, it will not succeed. Both [Examples 8.3-A](#) and [8.3-B](#) show that structure.

If, however, a weakness does not warrant a full counter-analysis, and you believe it can be addressed in a dependent clause, you will likely address the weakness before you dive into your primary argument. Including a dependent clause in the middle of your primary analysis is likely to interrupt the flow your analysis. Putting the dependent clause at the end of your analysis is likely to surprise your reader with a new, uncomfortable fact that will prompt her to go back to your analysis and re-read it with this new fact in mind. For these reasons, if you address a weakness in a dependent clause, you will typically do so at the outset of your analysis, as in [Example 8.3-G](#).

## VI. The Counter-Analysis and Your Explanation of the Law

Often times, a counter-analysis will rely on law that your primary analysis does not. For example, in the first Example in this chapter, [Example 8.3-A](#), the primary analysis relied on the *Jewett* case and the opposing analysis relied on the *Kruse* case.

In that situation, when the opposing argument relies on different law, a question arises about where to describe the law that supports the counter-analysis. Two options exist: (1) You can describe the law supporting the opposing argument at the same time you explain all the other law relevant to the element or factor, or (2) you can explain the law relevant to the opposing argument as part of your explanation of the opposing argument.

Usually, the most effective approach is the first approach. That is, explain *all* the law relevant to an element or factor—including the law that supports the opposing argument—in the explanation of the law before you explore either your primary analysis or the opposing analysis. Remember that the idea behind explaining the law is to educate your reader about the relevant law and to provide your reader an appropriate context for understanding your analysis.

You fully educate and prepare your reader for the analysis only by explaining *all* the law and how it fits together. Thus, typically, explain all the law relevant to analyzing an element or factor before exploring either your main argument or the opposing argument. [Example 8.3-A](#) shows how all of the law can be explained at the outset, even though some of the law will be relied on only in the opposing analysis.

Only rarely should you wait to explain the law that supports the opposing argument in the counter-analysis section, rather than explaining all the law in the explanation section. An attorney might wait to explain the law that supports the counter-analysis if the attorney thinks that law represents non-mandatory law. In that instance, the attorney is making the judgment that, although opposing counsel might attempt to use that law to support an alternative argument, that law really lies outside the body of relevant law. In [Example 8.3-B](#), the attorney waits to describe the *Charnelton* case because the attorney believes that, although opposing counsel might try to rely on *Charnelton*, that case does not actually address the same issue.

Usually, however, attorneys expect all the relevant law to be explained before a client's case is analyzed. Attorneys do not want to be surprised by new, relevant law in the middle of an analysis. Thus, in most instances, explain all the relevant law before you explain your analysis and counter-analysis.

### Practice Points



- An effective counter-analysis should explain the opposing analysis; explain why the opposing analysis will, ultimately, not succeed; and finally, return to your initial conclusion.
- When explaining the opposing analysis, the opposing analysis should be fleshed out in as much detail as you would explain your primary analysis.
- While you should always consider whether a counter-analysis exists, include one only when a viable opposing argument exists. If one does not exist, simply explain why the outcome you predict is clear.
- If your argument includes a counter-analysis, the counter-analysis should appear at the end of your application section. If a weakness can be addressed in a dependent clause, include that dependent clause at the outset of the application, before you dive into the details of your primary analysis.

## Section 8.4

### Applying the Law: Organizing Your Application of the Law

Now that you have applied the law to your client's facts, you will need to check whether you have done so in an organized manner. Checking your organization is rather straightforward and requires comparing your application of the law to your explanation of the law. Those two halves of a legal argument are linked and should reflect each other in content and organization.

In the explanation of the law, you set up a framework by setting forth the rules that guided courts in the past and then illustrating those rules with the facts, holding, and rationale of the case law. In doing so, you followed a deliberate path: You discussed the most important points first; then you presented the "weightiest" authorities before authorities that were less likely to control.

Typically, the application of the law should follow the same organizational path as the explanation did. If your application of the law follows a different path, then you need to stop and consider whether your explanation of the law or your application of the law needs to be re-organized.

Your application should discuss first the argument that a court is most likely to adopt. Do not address the weaker argument first to "get it out of the way." Attorneys expect the strongest argument first.

If you have addressed the strongest argument first, but the rule or case that illustrates that rule is not similarly discussed first in your explanation of the law, you should consider whether you need to re-organize your explanation of the law.

[Example 8.4-A](#) shows how to check your application of the law to determine whether it is well-organized.

#### Example 8.4-A • Checking the organization

**Idea 1 explained:** Constructive notice when use would give owner knowledge of plaintiff's use. *Davis* case illustrates idea.

**Idea 2 explained:** Intermittent use may give notice. *Hoffman* case illustrates the idea.

The Neros can probably establish constructive notice because they built a fence on the purported boundary and used the land extensively and openly. A plaintiff provides constructive notice of a claim when the plaintiff's use of the property would give the owner knowledge of the use and claim. *E.g., Hoffman*, 994 P.2d at 110. [1] The use does not have to be visible from the owner's land to give the owner constructive notice. *Davis*, 898 P.2d at 807. For example, in *Davis*, the plaintiffs built a fence. *Id.* The court held that the fence gave constructive notice even though the fence was not visible from the owner's land because the plaintiffs and neighbors respected it as the boundary line. *Id.*; *see also Slak*, 875 P.2d at 519 (constructing a fence was the "classic example" of open and notorious use.) [2] Intermittent use of the land may also suffice, if that use is sufficient to give notice. *Hoffman*, 994 P.2d at 110. In *Hoffman*, occasional livestock grazing and maintaining a fence were enough activity to establish constructive notice. *Id.* at 111, 112.

**Idea 2 applied:** Discusses intermittent use and applies the *Hoffman* case.

**Idea 1 applied:** Discusses use that would give notice and applies the *Davis* case.

The Neros can likely show constructive notice to Ms. Cramer because [2] they used the property in more than an intermittent manner. If, as in *Hoffman*, occasional use and maintaining a fence were sufficient to show constructive notice, then the Neros can show constructive notice because they built a fence and worked the land heavily during the growing season. In addition, [1] the Neros' fence marked the purported property line, which the Neros and their neighbors respected. In fact, the Neros' fence was always visible from the western lot, even when they allowed the garden to return to its natural state. Because the non-visible

fence in *Davis* provided constructive notice, the Neros' visible fence should provide notice, too.

In [Example 8.4-A](#), the writer applies the law in the reverse order from which it was explained. Applying the law in the reverse order may confuse the reader because the explanation of the law serves as a roadmap for the application; the reader may become disoriented when the application follows a different order. To avoid the confusion, unless there is a strategic reason to do otherwise, the writer of [Example 8.4-A](#) should determine which idea is most important and describe that idea first in both the explanation and the application of the law, as in [Example 8.4-B](#).

#### **Example 8.4-B • Order of application section reflects order of explanation section**

**Idea 1 explained:** Intermittent use may give notice. *Hoffman* case illustrates the idea.

**Idea 2 explained:** Constructive notice when use would give owner knowledge of plaintiff's use. *Davis* case illustrates idea.

The Neros can probably establish constructive notice because they built a fence on the purported boundary and used the land extensively and openly. A plaintiff provides constructive notice of a claim when the plaintiff's use of the property would give the owner knowledge of the use and claim. *Hoffman*, 994 P.2d at 110. [1] Intermittent use of the land may suffice if that use is sufficient to give notice. *Id.* In *Hoffman*, occasional livestock grazing and maintaining a fence were enough activity to establish constructive notice. *Id.* at 111, 112. [2] The use does not have to be visible from the owner's land to give the owner constructive notice. *Davis*, 898 P.2d at 807. For example, in *Davis*, the plaintiffs built a fence. *Id.* The court held that the fence gave constructive notice even though the fence was not visible from the owner's land because the plaintiffs and neighbors respected it as the boundary line. *Id.*; see also *Slak*, 875 P.2d at 519 (constructing a fence was the "classic example" of open and notorious use).

**Idea 1 applied:** Discusses intermittent use and the *Hoffman* case law.

**Idea 2 applied:** Discusses use that would give notice and applies the *Davis* case.

The Neros can likely show constructive notice to Ms. Cramer because [1] they used the property in more than an intermittent manner. If, as in *Hoffman*, occasional use and maintaining a fence were sufficient to show constructive notice, then the Neros can show constructive notice because they built a fence and worked the land heavily during the growing season. [2] In addition, the Neros' fence was always visible from the western lot, even when they allowed the garden to return to its natural state. In fact, the Neros' fence was the property line respected by the Neros and all of their neighbors. Because the non-visible fence in *Davis* provided constructive notice, then the Neros' visible fence should provide notice, too.

Although the application of the law should generally follow the same organizational path as the explanation of the law, this advice goes only so far. When your application involves an analogical argument, the order in which you discuss the facts of a prior case in your application may differ from the order in which you discussed those facts in your case illustration. That's because the purpose of a case illustration is to tell a story about what happened in the past and the legal result that followed. As a result, in a case illustration the facts are often explained chronologically. By contrast, in the application, the goal is to show a factual similarity to a prior case. Chronology is no longer important. Although, at times, the facts in a case illustration and the facts in an analogical argument may follow the same order (and that similar order can be helpful to the reader), you should not make it a goal to follow the same chronology in which the facts were originally explained. Rather, when comparing facts to a prior case, your goal should be to establish a factual similarity.

#### **Practice Points**



- Compare your application of the law to your explanation of the law to make sure each reflects the other in content and structure.
- Let your application of the law follow the same organizational path that your explanation of the law followed. Address the same points in the same order in both sections.

## Chapter 9

### **Conclusions to One Legal Argument**

[I. Using a Conclusion to Begin a Legal Argument](#)

[II. Using a Conclusion to End a Legal Argument](#)

[III. Using a Conclusion to Introduce Your Application](#)

[IV. Drafting Conclusions](#)

Attorneys use conclusions to keep readers focused on the point being made. As a result, attorneys use conclusions to begin a legal argument, to end a legal argument, and sometimes to introduce the application of the law.

## I. Using a Conclusion to Begin a Legal Argument

Attorneys state a conclusion at the outset of an argument to identify the element or factor being explored and to tell the reader the direction in which the argument is headed. If a reader knows where an argument is headed, the reader can more easily appreciate the importance of information along the way.

[Example 9-A](#) shows a short argument that begins with a conclusion. Notice that the writer ends the paragraph with a conclusion, too.

### Example 9-A • Legal arguments begin and end with conclusions

Conclusion

Jacob Tulchin is “closely related” to his birth mother, Addie Green. To be closely related, the plaintiff must reside in the same household or be the parent, sibling, child, or grandparent of the victim. *Thing v. La Chusa*, 771 P.2d 814, 830 n.10 (Cal. 1989). Although Jacob Tulchin did not grow up in the same household as Addie Green, because he is her biological child, he is closely related to her.

Explanation followed by application

Conclusion

Although attorneys usually begin their arguments with a conclusion, for strategic reasons, you may occasionally begin your argument with a statement of the issue. For example, you may use a statement of the issue if the conclusion is too complex to be easily understood at this point in the memo’s text. Or you may use a statement of the issue to focus the reader’s attention on the particular legal question being asked. [Example 9-B](#) shows you what an issue statement looks like.

### Example 9-B • Issue statement begins the legal argument

Issue statement

After proving actual possession, the Neros will have to demonstrate that their possession of the land was open and notorious. To prove that their possession was open and notorious, the plaintiffs must show that the owners had notice that they were asserting title to the disputed property. *Slak*, 875 P.2d at 519. The notice may be actual or constructive. *Id.*

In [Example 9-B](#), the attorney uses an issue statement to introduce an argument because the conclusion is complicated. The conclusion rests on two alternative analyses: whether the landowner had actual or constructive notice. Describing the conclusion for each analysis at the outset would have been difficult for the reader to absorb, so the attorney used an issue statement instead.



## **II. Using a Conclusion to End a Legal Argument**

Attorneys also place a conclusion at the end of a legal argument. The final conclusion reminds the reader of the point that has been established in the legal argument.

Although the final conclusion may seem redundant of your initial conclusion, remember that a legal argument is complex. A legal argument sets out a synthesized explanation of the law—an explanation that often includes many legal authorities—and then applies that synthesized explanation to a detailed description of your client’s facts. The conclusion wraps it up for your reader and reinforces your prediction, increasing the likelihood that your reader will retain your point. [Example 9-A](#), above, shows a short argument that both begins and ends with a legal conclusion.

### III. Using a Conclusion to Introduce Your Application

In addition to conclusions at the beginning and end of a legal argument, you may also decide to introduce your application of the law with a conclusion. A conclusion at this spot in the analysis helps to focus the reader on the point your analysis will prove. [Example 9-C](#) shows a legal argument with three conclusions—one at the beginning, one at the end, and one leading into the application section.

#### Example 9-C • Using conclusions within a legal argument

A conclusion begins the legal argument.

Mr. and Mrs. Nero can most likely prove actual possession. Plaintiffs can establish actual possession by showing that they used the land as an owner would use that particular type of land. *Zambrotto v. Superior Lumber Co.*, 4 P.3d 62, 65 (Or. Ct. App. 2000). Courts focus on the type of use for which the land is suited and do not necessarily focus on the amount of activity. *Id.* Plaintiffs in past cases have shown that they used the disputed land as an owner would in a variety of ways. See *Davis v. Park*, 898 P.2d 804, 806-07 (Or. Ct. App. 1995); *Slak v. Porter*, 875 P.2d 515, 518 (Or. Ct. App. 1994). In *Davis*, the plaintiffs established that they used the disputed property as an owner would by showing that they used the disputed property as they did their adjoining land. 898 P.2d at 806-07. In *Slak*, the plaintiffs built a fence and planted vegetation and, in that way, proved actual possession. 875 P.2d at 518.

A conclusion introduces the application.

Mr. and Mrs. Nero should be able to prove that they had actual possession of their land because they used the disputed property in a manner that an owner would. Like the landowners in *Davis*, the Neros used the disputed land exactly as they did their adjacent land: In both parcels of land, they planted and maintained a garden and fruit trees. In addition, like the plaintiffs in *Slak* who showed actual possession by building a fence and planting vegetation, the Neros built a fence and planted vegetation in their garden and orchard. The Neros should, therefore, be able to prove that they actually possessed the disputed land.

A conclusion ends the legal argument.

## IV. Drafting Conclusions

Drafting conclusions is a straightforward process. The goal is simply to convey your bottom-line point as precisely and concisely as possible. The following tips will help you do that.

- **Describe the certainty of your prediction**

When you state your conclusion, you will have to decide how certain you are about the outcome. As a novice attorney you may think that you are never certain about the outcome. But simply saying that a court could decide one way or a court could decide another way is not helpful to your colleague who has asked you to research a legal question.

You must indicate the outcome that is more likely and how likely that outcome is. To help, [Table 9-D](#) contains phrases attorneys commonly use to express their degree of certainty regarding an outcome.

### Table 9-D • Degrees of Certainty

- A court **will likely** conclude the plaintiff can (cannot) establish....
- A court **will probably** decide the government did (did not) prove....
- A court **should** determine the employer can (cannot) demonstrate....

- **Focus on the element or factor being explored**

Your conclusion should be about the element or factor being analyzed and not about a larger or smaller legal idea. You can see the difference between a conclusion that focuses on the element at issue and one that does not if you compare [Examples 9-E](#) and [9-F](#). In those examples, the arguments consider whether a falafel stand is a “building.” In the first example, [Example 9-E](#), the conclusions (in gray) do not include the word “building,” leaving the reader confused about how the conclusion is connected to the argument.

### Example 9-E • Conclusions are *not* focused on the element at issue

The deed restriction should not prevent our client from having a falafel stand on the site. Under state law, a “building” is “a constructed edifice designed to stand more or less permanently ... [and] intended for use in one place.” *State v. Ahuja*, 56 S.E.2d 142, 144 (Fla. 2d Dist. Ct. App. 1988) (relying on *Webster’s Third New International Dictionary* 292 (1971)).

In this case, the falafel stand is not a building because it can be moved. To get the falafel stand to its current site, wheels were attached and the falafel stand was towed. At the site, the wheels were removed, but they can be replaced, which would allow the falafel stand to be towed away. Thus, the falafel stand is not “designed to stand more or less permanently” nor is it “intended for use in one place.” Therefore, the deed restriction should not restrict the client’s business.

Below, in [Example 9-F](#), the conclusion repeats the word “building,” which is the element being explored. By using the language of the element in the conclusion, the writer makes it easy for the reader to see the connection between the conclusion and the argument.

### Example 9-F • Conclusions *are* focused on the element being addressed

A court is likely to hold that our client’s falafel stand is not a “**building**.” Under state law, a “building” is “a constructed edifice designed to stand more or less permanently ... [and] intended for use in one place.” *State v. Ahuja*, 56 S.E.2d 142, 144 (Fla. Dist. Ct. App. 1988) (relying on *Webster’s Third New International Dictionary* 292 (1971)).

In this case, the falafel stand is not a building because it can be moved. To get the falafel stand to its current site, wheels were attached and the falafel stand was towed. At the site, the wheels were removed, but they can be replaced, which would allow the falafel stand to be towed away. Thus, the falafel stand is not “designed to stand more or less permanently” nor is it “intended for use in one place,” and it is not a **building**.

- **The line between your application and your final conclusion may blur**

Often you will not need a final conclusion that is distinct from your application of the law. A complete application explains the legal consequence of the law being applied to facts. As a result, your application often leads directly into a conclusion, as it does in [Example 9-G](#).

Read [Example 9-G](#) with and then without the last sentence. As you can see, the application would not be complete without the last sentence. But because the last sentence of the application also states the conclusion, you do not need a separate sentence repeating the conclusion.

**Example 9-G • Your application may overlap with your conclusion**

Jacob Tulchin is closely related to his birth mother, Addie Green. To be closely related, the plaintiff must reside in the same household or be the parent, sibling, child, or grandparent of the victim. *Thing v. La Chusa*, 771 P.2d 814, 830 n.10 (Cal. 1989). Although Jacob Tulchin did not grow up in the same household as Addie Green, because he is her biological child, he is closely related to her.

**• Vary the wording, but not the substance, of your initial and final conclusions**

Although you will assert the same substantive conclusion at the beginning and end of your argument, you do not want to mechanically repeat the same words. In each of the examples in this chapter, you can see that the conclusions at the beginning differ in form from the conclusions at the end (although not in substance).

One way to vary your conclusions is to give more information in the final conclusion than at the beginning. By the time you reach your final conclusion, your reader is more informed about the relevant law and facts. With more knowledge, your reader will be able to absorb more details at the end than at the outset.

**Practice Points**



- Use a conclusion at the start of an argument to identify the element or factor being explored and to tell the reader the direction in which the argument is headed.
- Use a conclusion at the end of the argument to remind the attorney of the point that has been established in the legal argument.
- Use a conclusion to introduce your application section to help focus the reader as to the nature and scope of your analysis.

## Chapter 10

### Policy

[I. When to Include Policy in a Legal Argument](#)

[II. Identifying Legislative Policy in a Statute](#)

[A. Policy Codified in a Statute](#)

[B. Policy Recorded in Legislative History](#)

[C. Legislative Policy Discussed in a Judicial Decision](#)

[III. Identifying Judicial Policy in the Common Law](#)

[IV. Where to Include Policy in a Legal Argument](#)

“Policy” refers to the broader moral, philosophical, or social goals behind a law. Legislatures, for example, enact statutes to address societal problems. The legislature’s reason for enacting the statute is the policy behind the statute. Similarly, courts issue judicial decisions that are shaped by policy. When a court interprets statutory language, its decision is often based on the legislature’s reason for enacting the statute. In addition, when a court issues a common law decision, policy concerns often motivate its decision. Understanding the policy behind a statute or a judicial decision can strengthen your understanding of the law and can help you to create effective legal arguments.

## I. When to Include Policy in a Legal Argument

You may want to use policy in your predictive memorandum to clarify language in a statute or judicial opinion that is vague, ambiguous, or subject to multiple interpretations. Policy can help explain the law's intended meaning and provide the reader with helpful background information to understand your analysis and prediction more fully.

[Example 10-A](#) is an excerpt from a memorandum in which the attorney uses policy to clarify the meaning of language in the Americans with Disabilities Act (ADA). The attorney is examining whether an employer must accommodate an employee who has trouble getting along with co-workers. Under the ADA, if an employee's disability limits a major life activity, an employer may not fire the employee because of the disability; rather, the employer must accommodate the employee's disability. The writer predicts the employer will not have to accommodate the employee's inability to get along with others. Her prediction is based in part on the legislative policy that Congress intended the term "major life activity" to be strictly interpreted so as not to unduly burden employers.<sup>1</sup>

### Example 10-A • Policy used to clarify law's intended scope

Our client, Maudiere Industries, has a strong argument that Jonathan Kitvan would not qualify as disabled under the Americans With Disabilities Act (ADA). To qualify as disabled, Mr. Kitvan must show: (1) that he has a physical or mental impairment, (2) that the impairment limits a major life activity, and (3) that this limitation is substantial. 42 U.S.C. §12102(2)(A) (2000); *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 194-95 (2002). Only the second element, whether the employee's impairment limits a major life activity, is at issue.

Mr. Kitvan will probably not be able to establish that his inability to interact well with others at work is a major life activity. The Supreme Court has defined "major life activity" as an activity of central importance to daily life. *Id.* at 197. Examples of qualifying activities include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. §84.3(j)(2)(ii) (2005). The federal regulations do not mention interacting with others as a major life activity.

While the regulatory examples are not exhaustive, the Supreme Court explicitly held in *Toyota* that the terms of the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled." 534 U.S. at 197; *see also Soileau v. Guilford of Me., Inc.*, 105 F.3d 12, 15 (1st Cir. 1997) (rejecting interacting with others as a major life activity because, the standard is so amorphous, it is difficult for employers to apply effectively to their employees).

In addition, the Court in *Toyota* explained that a "demanding standard for qualifying as disabled" must be adopted so that the ADA does not extend beyond those Congress intended to reach. 534 U.S. at 197. When the term "major life activity" is broadly interpreted to include interacting with others, that standard is significantly lowered and would require employers to accommodate more than Congress intended.

Here, the court is unlikely to adopt a broad definition of major life activity that will circumvent the demanding standard required by the Court in *Toyota*. Because interacting with others is unlikely to be considered a major life activity, we do not anticipate that Mr. Kitvan will need to provide the requested accommodations.

## II. Identifying Legislative Policy in a Statute

If the law is embodied in a statute, you will look to the statute, legislative history, and case law to find the policy behind the statute.

### A. Policy Codified in a Statute

The legislature may explicitly state the policy behind a law and codify the reasons it enacted a statute. As shown in [Example 10-B](#), the Michigan legislature provided the reason it enacted the state's whistle-blowers' statute in a preamble to the statute.

#### **Example 10-B • Preamble to Michigan's whistle-blowers' statute describes the reason the legislature enacted the statute**

AN ACT to provide protection to employees who report a violation or suspected violation of state, local, or federal law; to provide protection to employees who participate in hearings, investigations, legislative inquiries, or court actions; and to prescribe remedies and penalties.

[Example 10-C](#) is an excerpt from a California statute in which the legislature explains the purpose for its workers' compensation rules and the effect that purpose should have on the courts.

#### **Example 10-C • Statutory section explains purpose of California's workers' compensation rules**

#### **§3202. Liberal construction**

This division and Division 5 (commencing with Section 6300) shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment.

### B. Policy Recorded in Legislative History

Sometimes the legislature does not specifically explain its reasons for enacting a statute in the statutory text. In this instance, you must research the statute's legislative history to determine whether it contains helpful statements for understanding the statute's purpose. In [Chapter 2](#), *Sources and Systems of the Law*, we explained that the legislature's debate about whether to enact a statute may be recorded. If it is, you may be able to find the reason for the statute there, within the legislative history.

[Example 10-D](#) shows how to use a statute's legislative history to explain a court's likely interpretation of statutory language.<sup>2</sup> In this example, the writer examines the legislative history of the Public Safety Officers' Benefits Act to analyze whether a family can recover death benefits on behalf of their son, who died while responding to a fire alarm.

#### **Example 10-D • A policy analysis based on legislative history**

We can also use the statute's legislative history and Congress's stated goals when enacting the statute to examine whether Christopher was a "firefighter," entitled to benefits. First, Congress intended the word "firefighter" to be more rather than less inclusive. In the statute's initial draft, the House of Representatives described a firefighter as someone who was "actually and directly engaged in the fighting of a fire." H.R. 365 94th Cong. (1975). The Senate, however, understood "firefighter" as "includ[ing] a person serving as an officially recognized or designated member of a legally organized volunteer fire department." S. 2572, 94th Cong. (1975). When the two houses reconciled the different versions, they explained the final version would follow the Senate's language and "authorize" payment for all line of duty deaths. H.R. Rep. No. 94-1501, at 5-6 (1976).

The legislative history is described in two paragraphs.

The broader language incorporated into the statute reflects congressional intent to provide for firefighter death benefits as a matter of equity. *Demutiis v. United States*, 48 Fed. Cl. 81, 85-86 (2000). The Senate explained that "to provide the assurance of a Federal death benefit to his survivors is a very minor recognition of the value our government places on the work of this dedicated group of public servants." S. Rep. No. 94-816, at 3-4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2504, 2505. In an earlier version, the House Judiciary Committee similarly

recognized “society’s moral obligation to compensate the families of those individuals who daily risk their lives to preserve peace and to protect our lives and property.” H. Rep. No. 94-1032, at 3 (1976).

Previous case law has also researched and interpreted the legislative history.

Based on Congress’s goals, the statute has been defined as a remedial statute that “should be construed liberally to avoid frustration of its beneficial legislative purposes.” *Demutiis*, 48 Fed. Cl. at 86. When a statute is liberally construed, courts understand “the statutory rule or principle [to] apply to more things or in more situations than would be the case under a strict construction.” *Bice v. United States*, 72 Fed. Cl. 432, 441 (2006) (quoting 3 N. Singer, *Sutherland Statutory Construction* §60.1 (6th ed. 2001)).

The writer applies the legislative history explained above to analyze how a court is likely to interpret and apply the statutory language.

Holding that Christopher was a “firefighter” is consistent with Congress’s intent. As a junior apprentice firefighter, Christopher’s duties were limited. While he was not permitted to actually engage with the fire, he participated by bringing out equipment and fire hoses; providing food, drink, and first aid to other firefighters; and cleaning up after fires were under control. Fire Chief Montella asserted that Christopher was “part of the team,” explaining that if he was not there, somebody else would have to do his job. In fact, after his death, Christopher was included in the Brookhaven Fire Department’s honor roll.

Based on the duties that he did perform, his role within the department, the congressional purpose in recognizing the individuals who risk their life to preserve and protect others, Christopher was arguably “a person serving as an officially recognized or designated member of a legally organized volunteer fire department.” Moreover, at each step of our argument, we should remind the court that the statute is to be liberally construed, and thus, any questions about whether benefits should be conferred should be resolved in favor of granting benefits.

### **C. Legislative Policy Discussed in a Judicial Decision**

Sometimes a court has already researched and interpreted the legislative history of a statute. When a court has already researched and used that policy to support its decision, you may need to look no further than the case law for an explanation of the policy. In [Example 10-E](#), a New York court explains why the New York legislature enacted a priest-penitent privilege.

#### **Example 10-E • A judicial opinion explains the policy behind a statute**

“It has been recognized, without serious disagreement, that there existed no common-law priest-penitent privilege.... By statute, however, ‘a confession or confidence made to [a clergyman] in his professional character as spiritual advisor’ shall not be disclosed ‘[u]nless the person confessing or confiding waives the privilege.’ (CPLR 4505.) The Legislature, by enacting CPLR 4505 and its predecessors, responded to the urgent need of people to confide in, without fear of reprisal, those entrusted with the pressing task of offering spiritual guidance so that harmony with one’s self and others can be realized.”

*Keenan v. Gigante*, 47 N.Y.2d 160, 166 (1979).

Likewise, in [Example 10-F](#), a federal court examines the legislative history behind the Public Safety Officers’ Benefits Act to determine whether the statute should be construed broadly or narrowly. If you look back at [Example 10-D](#), you can see how the federal court’s analysis is then incorporated into a memorandum.

#### **Example 10-F • A judicial opinion examines legislative history to determine how to interpret the statute**

“In this regard, the Senate Report accompanying the enactment [of the Public Safety Officers’ Benefits Act] explains: ... ‘The physical risks to public safety officers are great; the financial and fringe benefits are not usually generous; and the officers are generally young with growing families and heavy financial commitments.... To provide the assurance of a Federal death benefit to his survivors is a very minor recognition of the value our government places on the work of this dedicated group of public servants.’ S. Rep. No. 94-816, at 3-4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2504, 2505. *See also Russell v. Law Enforcement Assistance Admin.*, 637 F.2d 1255, 1261 (9th Cir. 1980)....”



“It has long been a ‘familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes.’ *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).... This canon frequently has been applied in interpreting Federal statutes conferring benefits and rights on employees. *See Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994) (Federal Employers’ Liability Act).... The PSOPA is likewise remedial in nature and thus should not be applied grudgingly, but rather should be construed liberally to avoid frustration of its beneficial legislative purposes.”

*Demutiis v. United States*, 48 Fed. Cl. 81, 85-86 (2000) (footnote omitted).

### III. Identifying Judicial Policy in the Common Law

Just as a legislature sometimes explains its social goals in the text or legislative history of a statute, a court issuing a common law decision may recognize the social goals it weighed in rendering its decision. [Example 10-G](#) contains a portion of the California Supreme Court's decision in *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. 1976), where the court announced a common law duty to warn when a psychiatrist's patient poses a serious threat of violence to another individual.

#### **Example 10-G • Court uses policy to adopt a common law duty to warn**

"We recognize the public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy,... and the consequent public importance of safeguarding the confidential character of psychotherapeutic communication. Against this interest, however, we must weigh the public interest in safety from violent assault.... We realize that the open and confidential character of the psychotherapeutic dialogue encourages patients to express threats of violence, few of which are ever executed. Certainly a therapist should not be encouraged routinely to reveal such threats; such disclosures could seriously disrupt the patient's relationship with his therapist and with the persons threatened. To the contrary, the therapist's obligations to his patient require that he not disclose a confidence unless such disclosure is necessary to avert danger to others, and even then that he do so discreetly, and in a fashion that would preserve the privacy of his patient to the fullest extent compatible with the prevention of the threatened danger.... We conclude that the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins."

*Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 346-47 (Cal. 1976).

#### IV. Where to Include Policy in Your Legal Argument

You will generally want to set out the relevant policy—whether statutory text, legislative history, or case law—in the explanation of the law section. Because policy is not black-letter law, however, and is not binding on a court, you will generally want to apply it near the end of your legal argument, after your analysis of the other legal authority. The procedure described in [Table 10-H](#) provides a starting point for including policy in your application.

**Table 10-H • Where to include policy in your argument**

<b>Conclusion</b>	State your prediction about the element or factor being analyzed.
<b>Explain the Law</b>	<div>Describe<ul style="list-style-type: none"><li>• Rule(s) relevant to the legal question you are analyzing</li><li>• Case illustrations<ul style="list-style-type: none"><li>◦ If a judicial opinion discusses legislative policy or uses policy in its determination of the common law, include the explanation of the policy when describing the case illustration.</li></ul></li><li>• Legislative history<ul style="list-style-type: none"><li>◦ If policy is described in a statute's legislative history, typically describe the policy after you have described any relevant case illustrations.</li></ul></li></ul></div>
<b>Apply the Law</b>	<div>First, describe the analysis the court is most likely to adopt.<ul style="list-style-type: none"><li>• Use analogical reasoning to apply the case law to the facts of your client's case.</li><li>• Use rule-based reasoning to apply policy to the facts of your client's case.</li></ul>Second, if a counter-analysis is necessary, describe the analysis that the court is less likely to adopt.<ul style="list-style-type: none"><li>• Use analogical reasoning to distinguish the case law from the facts of your client's case.</li><li>• Use rule-based reasoning to distinguish the policy from the facts of your client's case.</li></ul>Then, explain why a court is less likely to adopt that analysis.</div>
<b>Conclusion</b>	Restate your prediction.

Of course, the process described in [Table 10-H](#) can be modified according to circumstances. As with all legal writing, you will want to think about policy strategically. For example, when case law is sparse or non-existent, such as in a case of first-impression, or when policy is integral to the analysis, you may want to discuss policy earlier in your explanation and earlier in your analysis. On the other hand, when the body of law is well-established, policy can be used to supplement and reinforce the black letter law. Either way, explaining the policy behind a statute or judicial decision can increase the reader's understanding of the law and how it should be applied. It can also work to the advantage of your client by producing a stronger legal argument.

#### Practice Points



- Policy is the broader moral, philosophical, or social goals behind a statute or common law judicial decision.
- Policy can help explain the law's intended meaning and provide the reader with helpful background information so that the reader can understand your analysis and prediction more fully.
- If the law is embodied in a statute, you will look to the statutory text, legislative history, and case law to identify relevant policy.
- A court may also use policy to support its decision under common law.

1. [Example 10-A](#) is based on a student sample from Whitney Passmore, Wake Forest University School of Law.

<sup>2</sup> This analysis was constructed from the case *Messick v. United States*, 70 Fed. Cl. 319 (2006), *rev'd*, 483 F.3d 1316 (Fed. Cir. 2007). The analysis shows only a part of what would be a complete analysis.

## Chapter 11

### **Statutory Analysis**

[I. Statutory Analysis: A Multi-Step Process](#)

[II. Reading the Statute](#)

[III. Interpreting the Statute](#)

[A. Understanding Methodologies](#)

[B. Sources of Evidence](#)

[IV. Drafting a Statutory Analysis](#)

More and more of our state and federal laws come from statutes. As a result, you must be prepared to carefully read and accurately analyze those statutes for your clients. [Chapter 3](#), *Reading for Comprehension*, explained how to carefully read statutes. This chapter will show you how to interpret and apply statutes to your client's case.

Sometimes after carefully reading a statute, you will discover that language in the statute could be understood in more than one way, and those different interpretations would yield different outcomes in your client's case. When that happens, you must be able to explain the possible interpretations a statute can yield and the interpretation a court is most likely to adopt. This chapter explains how to do that.<sup>1</sup>

## I. Statutory Analysis: A Multi-Step Process

Statutory analysis is the process by which attorneys determine whether statutory language is ambiguous and, if so, the interpretation a court is most likely to adopt and apply to the client's case. Statutory analysis is a multi-step process, not a one-stop assessment. [Table 11-A](#) summarizes the steps of the process.

**Table 11-A • A framework for a basic statutory analysis**

1. Read the statute carefully and critically.
2. Interpret the statute.
  - A. Find the meaning of the written words. Consider the plain meaning of the statute's text, and then consider the text in the context of the statutory scheme and purpose. Look to intrinsic evidence of the legislature's intent.
  - B. If after considering the text and context, the meaning of the statute is still ambiguous, look to extrinsic evidence of the legislature's intent.
3. Apply the analysis to your client's facts and draft an objective analysis.

To understand how to craft your statutory argument, first remember the interplay between the courts and the legislature discussed in [Chapter 2, \*Sources and Systems of Law\*](#). The legislature creates the statutory rule, but the courts decide what the rule means and how it will apply to your client's facts. When interpreting a statute, the court's primary goal is to implement the statute as the legislature intended.<sup>2</sup>

Discerning the meaning of legislation is difficult, however, for the following reasons: (1) Words are imperfect to communicate intent because words are malleable, ambiguous, and meanings can change over time; (2) legislators cannot foresee all situations in which a statute may apply, so many times words and phrases are drafted without specificity so that the statute will apply to a broader range of circumstances; (3) sometimes legislators must compromise in the language of a statute due to social or political pressures or for purposes of special interests groups; and (4) new technologies and novel legal issues arise that were not contemplated by existing law.

Ambiguity in the law means that a statute (or a particular word or phrase in that statute) is susceptible to more than one meaning and those different meanings can yield different outcomes when applied to a particular set of facts.<sup>3</sup>

Sometimes new attorneys confuse "ambiguity" with "vagueness." "Vagueness," when related to statutes, means that the legislation establishes a requirement, prohibition, or punishment without explaining what specific conduct is required, prohibited, or will result in a punishment. Such legislation violates due process,<sup>4</sup> and the court can strike down the statute as unconstitutional.

"Ambiguity" and "vagueness" are terms of art. That is, to lawyers, these words have very specific meanings. So, when you use these words in a legal context, keep their precise definitions in mind.

For purposes of statutory interpretation we are primarily concerned with ambiguous text—words and phrases that can yield different plausible meanings and, therefore, different outcomes. This chapter will focus on how a statute with ambiguous terms should be analyzed and applied to your client's facts so that you can correctly advise your client.

## II. Reading the Statute

The first step in statutory analysis is to read the statute critically with an eye toward the statute's meaning and its context within the larger statutory scheme. How to read a statute critically is described in [Chapter 3, Reading for Comprehension](#). A quick summary of how to read a statute critically is captured in [Table 11-B](#).

**Table 11-B • Three steps of critical statutory reading**

<b>1. Get context for the statute.</b>	<ul style="list-style-type: none"><li>• In what jurisdiction does the statute apply?</li><li>• Is the statute criminal or civil?</li><li>• When did the statute go into effect?</li><li>• Where is your statute located within the statutory scheme?</li><li>• What does the statutory section govern?</li></ul>
<b>2. Skim the most pertinent statutory sections.</b>	<ul style="list-style-type: none"><li>• Does the statute prohibit, require, or simply permit behavior?</li><li>• To whom does the statute apply?</li><li>• Does the statute have any limiting language or exceptions?</li><li>• Does the relevant section cross-reference other sections?</li><li>• Do any definitions from other sections in the statutory scheme control the words in the section relevant to your client?</li><li>• Does the statute have elements, factors, or both?</li></ul>
<b>3. Read the text closely and question it.</b>	<ul style="list-style-type: none"><li>• Read carefully, slowly, and critically, marking any phrases, words, or punctuation that could affect the meaning of the statute.</li><li>• Note exactly what the statute prohibits, requires, or permits.</li><li>• Break down the statute into its components, whether elements, factors, or both.</li><li>• Highlight every red flag word and understand its function in the text.</li><li>• Think about how the statute, on its face, applies to your client's question.</li></ul>

The first two steps of the reading process familiarize you with the statute; however the foundational step for competent statutory analysis is the third step, reading the statute closely. In this step, you begin the core work in analyzing a statute by reading the text closely and questioning it. You will read the statute word by word and consider whether any words or phrases might be prone to alternative meanings. Without understanding the statute and how the words of the statute function, you will not be able to effectively analyze and interpret the statute.

To illustrate this point, remember the federal kidnapping statute you read in [Chapter 3, Reading for Comprehension](#), which prohibits a person from taking another person, except the parent of a minor child, for ransom, reward, or otherwise. That statute contains language that might be subject to alternative meanings. That statute exempts “parents” from being charged with kidnapping. If your client is a step-parent, the statute is not clear whether your client will be exempt from kidnapping charges. The word “parent” is ambiguous because it is prone to more than one interpretation. The word may be limited to biological and adoptive parents, or the word “parent” might include step-parents.

Because the term is ambiguous, you must discern the ways in which it can be interpreted and determine the definition a court would most likely adopt. To do this, identify the red flag words to see how they operate within the statute by diagramming the statute. [Table 11-C](#) summarizes the red flag terms introduced in [Chapter 3](#), and [Table 11-D](#) diagrams the statute by breaking down the statute and identifying the red flag words as they are organized within the statute.

**Table 11-C • Red flag words**

and	or	but
shall	will	may
including	except	not limited to
any	all	some
outweighs	either	

**Table 11-D • Finding red flag words and ambiguous terms in a statute**

Statutory language	Red flag word	Function
Whoever		
Unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, <b>or</b> carries away	"or"	Disjunctive phrasing means any of these actions of taking will satisfy this element of the statute.
<b>and</b> holds for ransom <b>or</b> reward <b>or</b> otherwise	"and"	Conjunctive; means that actor must not only take the victim (as described in previous element), but must also hold the person for one of the three reasons listed.
	"or"	As long as a person is taken for one of these three reasons, the element will be satisfied.
	"otherwise"	Here is an <b>ambiguity</b> —what does "otherwise" mean? pecuniary gain only? non-pecuniary gain included?
<b>except</b> in the case of a minor by the parent thereof	"except"	<b>Another ambiguity</b> —parents cannot be prosecuted for taking their minor children, but the statute does not define the term "parent."

Reading the statute, identifying the red flag words, and diagramming the statute require that you pay close attention to the words of the statute and the context in which those words are presented. These tasks will help you be ready for the next step, interpreting the statute.



### III. Interpreting the Statute<sup>5</sup>

Once you have read the statute, you will then have to interpret it. In the practice of law, you will typically find that some of the statutory terminology is ambiguous. You will have to figure out what the legislature intended or more precisely, what the court will think the legislature intended with the language it chose. To unlock statutory analysis, you need two keys: First, you must know the methodology, or steps of analysis, courts in your governing jurisdiction will use to interpret the statute. Second, you must know what evidence the courts rely on at each step of the analysis.

Courts rely on three different types of evidence to ascertain the legislature's intent: intrinsic, extrinsic, and policy.<sup>6</sup> Intrinsic evidence is cues from within the statute itself that illuminate the legislature's intent, such as the words, syntax, grammar, and punctuation of the statutory text. Extrinsic evidence is any source outside the statute that provides persuasive evidence of how the statute should be interpreted, such as legislative history, regulations, some cases, or scholarly commentary. Policy-based sources explain the reasons behind the law and often aid a court's interpretation of what the legislature intended.

This section explains the two dominant methodologies jurisdictions use and takes a closer look at the evidence courts rely on at each step of statutory analysis.

#### Sidebar

Statutory analysis often mentions the terms "interpretation" and "construction." "Interpretation" is the process of determining the legislative intent. Statutory "construction" is the process of giving statutory language a meaning consistent with the legislature's intent. Charles Calleros, *Legal Method and Writing* 32 (Aspen Pub., 5th ed. 2006).

#### A. Understanding Methodologies

A court's methodology sets out the analytical steps courts of that jurisdiction will use to interpret a statute and the specific evidence a court will use in each step to determine the legislature's intent. Some jurisdictions use a clearly articulated methodology when interpreting a statute; other jurisdictions approach statutory interpretation with more fluidity, following a more general scheme of looking, in turn, to the plain meaning, intrinsic sources, and then extrinsic sources.

For instance, some courts use a clearly articulated two-level approach: The first level uses intrinsic evidence to look at the text—what the written words actually say—within the context of the statutory section and the overall statutory scheme. Then, if the statute is still ambiguous, a court will move to the second level of analysis and review other evidence, usually extrinsic sources—sources outside of the text of the statute—to determine what the legislature intended the language to mean. (See Section B, *Sources of Evidence*, which explains these sources of evidence in more detail.)

On the other hand, other courts use a three-level methodology for statutory interpretation. On the first level, the court will use intrinsic evidence to examine the text and context of the statute.<sup>7</sup> If the meaning of the statute is still ambiguous, the court will move to the second level and look at the legislative history. Finally, if necessary, the court will move to a third level and use extrinsic evidence to determine what the legislature intended the ambiguous statute to mean.<sup>8</sup>

Although as a general rule courts move from intrinsic to extrinsic evidence, courts do vary in the sources allowed on each level. In some jurisdictions, for instance, if the statute as written yields an absurd result, courts may consider extrinsic sources of legislative intent (such as legislative history) as context on a first-level analysis; other jurisdictions may not consider various extrinsic sources as context until a later level of analysis.

Because methodologies can differ greatly among jurisdictions, before you begin to interpret a statute, you must first determine the number of analytical levels in your jurisdiction and the evidence the courts rely on at each level. Your statutory analysis will be persuasive only if you follow the approach that a court in the governing jurisdiction would follow. Further, you will have a much easier time understanding the law that applies to your client's question if you know the methodology a court will use.

Once you understand the nature of the methodology used in your jurisdiction, make sure you understand *which* sources of evidence can be used on each level of analysis. This next section will provide an overview of the sources of evidence commonly used by courts.

## **B. Sources of Evidence**

No matter the methodology, courts typically rely on three different sources of evidence mentioned earlier to ascertain legislative intent: intrinsic, extrinsic, or policy.<sup>9</sup> This chapter will examine the first two sources of evidence, intrinsic and extrinsic evidence. ([Chapter 10](#), *Policy*, examines policy-based evidence.)

### **1. Intrinsic evidence**

In most jurisdictions, the first level of statutory interpretation uses intrinsic sources to review the text in its context. Intrinsic evidence uses cues from within the text of the statute itself that illuminate the legislature's intent. This type of evidence is intrinsic because it looks to the text and the context of the actual statutory language, rather than to outside sources. For example, intrinsic evidence looks at the words, syntax, grammar, and punctuation of the statutory text.<sup>10</sup> Depending on a court's methodology, intrinsic evidence might also include the overall statutory scheme, prior cases interpreting the ambiguous language of the statute, and canons of construction.

#### **(a) Text and the plain meaning rule**

Courts start statutory analysis with the text—the exact words of the statute. Courts also start with a presumption that the words mean what they say on their face. Reading the words as written and interpreting them on their face is known as the “plain meaning rule.” The plain meaning rule dictates that ordinary words are understood to have their primary and ordinary meaning. For instance, in the kidnapping statute, mentioned above, the word “parent” would be understood by its ordinary definition if the statute had not defined it.

When applying the plain meaning rule, however, those critical reading steps you took earlier in the analytical process will help you understand the words of the statute. You will already have noticed the red flag words and how they function at that earlier stage. You will have marked key phrases and noted the number of elements or factors the statute sets out. Now, as you continue to analyze the text, pay attention not only to what the words say but also to how they are arranged. Notice the grammatical structure and punctuation; under the plain meaning rule traditional rules of punctuation apply.

In this level of statutory interpretation, when a word or phrase is ambiguous on its face, courts might look to see if the term is defined elsewhere in the statutory scheme. If the statutory scheme does define the term, the court will use that definition rather than the plain meaning.

In other instances, a court will also go beyond the plain meaning rule if the statute has technical words with specialized meanings. In statutory analysis, technical words are understood to have their technical meaning. For example, in a statute dealing with gas and oil production, the term “denaturing agent” would be defined specifically according to standards of that industry.

#### **(b) Text and context**

While courts generally start with a plain meaning analysis of the text, they usually cannot stop there. Because a single word can have many different meanings, courts have to use additional sources of intrinsic evidence to determine the meaning. One source is to look at the text in its context. Because words have little meaning when stripped of their context, text and its context are usually inextricably entwined when interpreting a statute.

A plain meaning rule analysis usually does not end the inquiry because words that seem clear on their face may not be clear when they are applied to a set of facts. For example, the word “possess” may seem clear at first glance. The word usually means to own or control something—one who buys a textbook for class surely “possesses” that book. That word, however, might not be so clear in a different context. If drugs are found in the car of a driver who does not know the drugs were left there by his teenage son's friend, is he in possession of the drugs?

Because words are more easily understood when read in context, to understand the meaning of a statute, courts look at the internal or intrinsic organization of the statutory section, the

words within a statutory section that surround the ambiguous text, the statutory scheme as a whole, related statutes, and the evolution of the statute (all prior amendments and revisions of the statute) to analyze the statutory text and context. In addition, courts may also use textual “canons of construction” to support an intrinsic contextual analysis.

(c) Textual canons of construction

Canons of construction are legal maxims that judges sometimes rely on to interpret the law. Numerous canons, too many to mention here, exist. Not all canons are compatible; many canons used by the courts frequently have another canon that says directly the opposite. Canons may be used to understand context, but they are not mandatory rules that must be followed.<sup>11</sup>

Textual canons of construction are intrinsic sources used to determine the meaning of the text in context. Textual canons look to the construction of the statute—the choice and placement of words, the grammar, and the syntax of the words—to discern what the legislature intended. [Table 11-E](#) lists some of the more common textual canons of construction and provides an example of how courts may use them. When you use canons to support your analysis of what a statute says, make sure to cite a case that uses that canon.

**Table 11-E • Textual canons of construction<sup>12</sup>**

**1. Canon regarding the plain meaning rule**

- “If language is plain and unambiguous it must be given effect.”

**2. Canons regarding specific words:**

- “May” means permissive; “shall” means “mandatory.”
- “And” means conjunctive; “or” means “disjunctive.”
  - Example: “... fruits, seeds, nuts, vegetables, honey, sheep, cattle, pigs, *and* poultry.” A person must produce all of these things to come under the statute. Change “and” to “or,” and a person would have to produce only one of them.

**3. Canons regarding ambiguous modifiers**

- “A modifier or exception applies only to the last antecedent in a phrase or list.”
  - Example: “Employees shall be paid base wages, environmental hazard pay, and overtime as determined by the lead agency to be consistent with private sector practices.” Under this canon, the underlined phrase modifies only “overtime,” the last antecedent; if, however, a comma had followed the word “overtime” the underlined phrase would have modified all three kinds of compensation listed.<sup>13</sup>

**4. Canons regarding lists of things**

**a. Noscitur a sociis:** Interpret an ambiguous word in a list by the company it keeps, that is, in light of the surrounding words.

“... pigs, cattle, sheep, and poultry.” Does “poultry” include exotic birds?

**b. Eiusdem generis:** General, catch-all phrases at the end of a list are construed to mean the same kind or type as the rest of the list.

If “motor vehicle” is defined as a “car, truck, or any other self-propelled vehicle not designed for running on rails,” does it include an airplane? A motorized scooter?

**c. Expressio unius, exclusio alterius:** Enumeration of specific things implies the exclusion of all others. If the word is not in, then it is meant to be out.

“rain, sleet, and hail” excludes snow.

**5. In pari materia:** Statutes with the same subject or purpose should be read together to effectuate that purpose.

For example, a statute setting out the punishment for kidnapping should be read in conjunction with a statute setting out sentencing guidelines for felonies.

(d) Cases

Cases can be intrinsic tools if they directly construe the specific ambiguous language at issue in a statute. If the case interprets the exact language in question, most courts will incorporate that analysis at the textual level. If the case does not actually interpret the relevant statutory language, then it will likely be used as extrinsic evidence.

Whether the case is allowed as intrinsic evidence may also depend on the hierarchical level of the court deciding the case. For instance, if the state supreme court interpreted the statute in a prior case, that interpretation becomes part of the statute as if it were written into the statute at the time of enactment.<sup>14</sup> Decisions by intermediate courts construing the statute may not, however, have the same weight. Understand what weight the courts in your jurisdiction give to precedent in that circumstance.

## 2. Extrinsic sources

If the meaning of the ambiguous statute is not clear after using the intrinsic sources of evidence, you can look outside the statute to see what other evidence sheds light on legislative intent. Extrinsic evidence derives from sources outside the statute that provide evidence of the legislature's intent. Those sources usually include the following: cases, agency interpretations and regulations, legislative history, non-textual canons of construction, or any other source, such as scholarly interpretations or parallel statutes in other jurisdictions, that provides persuasive evidence of how the statute should be interpreted.<sup>15</sup>

### (a) Cases

Cases that merely apply statutory language or that deal with issues tangential to the text of the statute in question may be extrinsic evidence a court can consider. Cases from other jurisdictions may also be considered extrinsic evidence. For instance, with the example of the federal kidnapping statute, a federal district court in California would not be bound by the ruling of a federal district court in Tennessee. If, however, the Tennessee court had construed the term "parent," the California federal district court might use that interpretation and construction as extrinsic evidence of what the legislature intended when drafting the statute.

### (b) Agency interpretations and regulations

Administrative agencies are charged with the task of implementing or enforcing statutes. To do so, they must first interpret what the statute means. Because the agency implementing the statute often has expertise in the area the statute controls, courts defer to agency interpretations when examining an ambiguous statute.<sup>16</sup>

Agencies may also promulgate regulations to implement the statute. Legislatures may create the statutory rule, but they often cannot create the more specific rules needed to make the statutory scheme work. Thus, legislatures charge agencies with that task. The regulations, or rules, the agency creates to implement the statute are a source of extrinsic evidence.

### (c) Legislative history

The legislative history is the record that follows a proposed bill as it makes its way through both houses of the legislature. Remember the legislative process from [Chapter 2, Sources and Systems of Law](#). Enacting a statute is a cumbersome business. A bill is proposed in one house, and then must be passed by both houses, before it goes to the president or governor for signature.

While the description is simple, the process is not. Often the bill must stop in various committees in each house where it is tweaked, revised, changed, and tweaked again. The legislative history may be comprehensive or abbreviated, but it will usually contain reports by the committees, statements made by proponents or foes of the bill, and any research or anecdotal material that the legislators submit with the bill.

A hierarchy exists within the sources of legislative history. Committee reports are typically given more weight than floor debates or legislative hearings on bills.<sup>17</sup> If you use legislative history, understand which source you are using and the weight of authority your jurisdiction gives to that category.

Because a legislative history includes so much information, brought by so many people, legislative history is often a morass of conflicting documents. Thus, a debate exists about the usefulness of relying on legislative history. Some judges want to use legislative history to shed light on the meaning of a statute; they believe that only by reviewing all the committee reports, floor debates, and history surrounding the statute from infancy to enactment, can the legislature's intent be revealed. Other judges revile legislative history as an abyss that does nothing to illuminate the statute's meaning. With the ongoing debate over the appropriateness of using legislative history, be sure to know the statutory methodology your jurisdiction uses and where legislative history falls on that scale.

### (d) Non-textual canons of construction

Courts may also rely on non-textual canons of construction, such as those set out below in [Table 11-F](#), to support a particular interpretation.

**Table 11-F • Non-textual (substantive) canons of construction<sup>18</sup>**

This chart notes a few of the many substantive canons of construction courts use.

1. Statutes in derogation of the common law will be narrowly construed.
2. Statutes are to be read in the light of the common law and a statute affirming a common law rule is to be construed in accordance with the common law.
3. Remedial statutes will be construed broadly.
4. Penal statutes will be construed narrowly.
5. A statutory provision requiring liberal construction does not mean disregard of unequivocal requirements of the statute.

**(e) Other sources**

Law review articles, scholarly assessments, or even parallel statutes from other jurisdictions may provide extrinsic evidence helpful in interpreting an ambiguous statute. In addition, outside considerations such as historical circumstances may provide extrinsic evidence a court would use to understand the legislature's intent. For example, if a court were considering an ambiguous provision of the Patriot Act, it might consider the historical circumstances of the events on September 11, 2001, which led to the statute's enactment.

Analyzing and interpreting a statute can be challenging, but it will be increasingly necessary as more law becomes codified. Once you have gone through the levels of interpretation and used intrinsic and extrinsic evidence to support your interpretation, you are ready to commit your analysis to paper.

## IV. Drafting a Statutory Analysis

Now that you have critically read and interpreted the statute, you are ready to write about it. When writing a discussion about a statute, you will follow the same general framework described in [Chapter 12, The Discussion Section: Introducing and Connecting Legal Arguments](#). First, create a roadmap section. That roadmap section will tell the reader your conclusion regarding the most likely way a court will resolve the statutory ambiguity in question. Your roadmap section will likely describe the statutory language at issue and outline the methodology courts in your jurisdiction use to analyze a statute. In doing so, your roadmap section will inform your reader about the major points you will cover and your bottom-line conclusion.

Once you get into the meat of the issue, the structure of the discussion will depend on the methodology your jurisdiction uses and the evidence allowed on each level. Organize your discussion around the evidence the courts will consider. Looking at each kind of evidence, describe the rules relevant to that evidence. That description will be your explanation of the law. Then, consider whether each kind of evidence, on balance, supports the interpretation that is helpful to your client's position. That will be your application of the law. Finally, conclude each individual legal argument.

[Example 11-G](#) shows one way a statutory analysis could be drafted in a legal memorandum. Notice how the writer walked through the steps of statutory interpretation. First, the writer sets out the applicable statute and identifies the problem language. Adhering to Arizona's methodology for examining statutes, she then examines the plain language to determine what the statute says on its face. Because the language is ambiguous, she uses intrinsic evidence, looking at the ordinary definition of the word and its statutory context, and then extrinsic evidence in the form of prior cases interpreting the term to answer her client's question.

### Example 11-G • A sample statutory analysis in a memorandum

#### DISCUSSION<sup>19</sup>

Roadmap paragraph sets out statutory issue to be examined and conclusion.

The writer follows the same basic mechanical structure in statutory analysis that she would have followed when analyzing an issue under case law. She begins with a roadmap, then for each main topic she explains the law by setting out the rules, explaining the rules, and then applying the rules.

In this first roadmap section, the writer explains that under Arizona methodology, she will start first with the text and look to the plain meaning of the statute to ascertain legislative intent. The roadmap section explains that under Arizona's methodology, the court can use extrinsic sources as context on this level of analysis. In looking at the text and context, the writer determines her client cannot be prosecuted under the statute.

The issue in this case is whether the word "person" in Arizona's anti-human smuggling statute includes human cargo, thus subjecting the human cargo to prosecution for being smuggled. The plain text of Arizona Revised Statutes Annotated §13-2319 indicates that the Arizona Legislature intended for this statute to prosecute "coyotes," the people in the business of smuggling migrants, not the smuggler's human cargo. Ariz. Rev. Stat. Ann. §13-2319 (West 2005). Since our clients are not in the business of smuggling migrants, their activity as human cargo falls outside the intended scope of §13-2319, and they cannot likely be prosecuted.

Arizona Revised Statute §13-2319 states:

- A. It is unlawful for a person to intentionally engage in the smuggling of human beings for profit or commercial purpose.
  - B. A violation of this section is a class 4 felony....
  - D. For the purposes of this section 'smuggling of human beings' means the transportation or procurement of transportation by a person or an entity that knows or has reason to know that the person or persons transported or to be transported are not United States citizens, permanent resident aliens or persons otherwise lawfully in this state.
- Id.*

Under Arizona rules of statutory interpretation, the court must begin its statutory analysis with the text of the statute. Plain text is the "best and most reliable" indication of a statute's meaning. *State v. Christian*, 66 P.3d 1241, 1243 (Ariz. 2003). If the court finds the plain text of §13-2319 ambiguous, the court may next look to the context, historical background, spirit and purpose of the statute. *Blake v. Schwartz*, 42 P.3d 6, 12 (Ariz. Ct. App. 2002). Both the text and

context of §13-2319 indicate that our clients' activity falls outside the intended scope of §13-2319; accordingly, we can move that the charges be dismissed.

**A. The ordinary meaning of the language in Arizona Revised Statute §13-2319(a) limits the scope of the statute to “persons” in the business of smuggling human beings.**

Here, the writer cites a canon of construction previously used by courts in that jurisdiction. The canon is more effective because it has supporting authority with it.

The plain text of § 13-2319(a) limits the meaning of “person” to those in the business of smuggling human beings “for profit or commercial purpose.” The purpose of a plain text analysis is to give effect to the legislature’s intent. *See Christian*, 66 P.3d at 1243. To do so, Arizona courts must give “each word, phrase, clause and sentence” meaning “its natural, obvious, and ordinary meaning” such that no other part of the statute is rendered “void, inert, redundant or trivial.” *Arpaio v. Steinle III*, 35 P.3d 114, 116 (Ariz. App.1 Div. 2001); *Stein v. Sonus, USA, Inc.*, 150 P.3d 773, 776 (Ariz. Ct. App. 2 Div. 2007). When a word is undefined by the statute, Arizona courts turn to any established and widely used dictionary to determine the natural and obvious meaning of a term. *Helvetica Servicing, Inc. v. Pasquan*, 277 P.3d 198, 205 (Ariz. App. 1 Div. 2012).

To define the ambiguous term, “person” the writer looks to another statute in which the term has been defined. Notice that the later statute does not appear to be in the same chapters as the smuggling statute at issue here.

Section 13-2319(a) subjects to criminal prosecution only those “person[s]” who smuggle “for profit or commercial purpose.” Under Arizona statute, a “person” includes corporations and a “natural person.” Ariz. Rev. Stat. Ann. § 1-215 (West 2002). The statute, however, applies only to those “persons” who smuggle for “profit” or “commercial purpose.” “Profit” is “net income ... from the conduct of business.” *Webster’s Third New International Dictionary* 1811 (Merriam-Webster 2002). Similarly, the word “commercial” is defined as “having profit as the primary aim.” *Id.* at 456. Therefore, a “person” who smuggles for “profit or commercial purpose” is one who seeks a “net income” from the “business” or who has profit as the primary aim of the smuggling operation.

The writer uses the plain meaning rule and defines other ambiguous terms (not defined elsewhere in the statutory code or in other cases) by their ordinary definition. To do so, she cites the dictionary.

Thus, by choosing the terms “for profit” and “commercial purpose” the Arizona legislature chose to impose criminal sanctions on the smuggler, not the human cargo. In the world of human trafficking, two types of people play two very different roles. One person is the “coyote” or smuggler; the other is the human being who is smuggled by the coyote. Coyotes are in the business of transporting or procuring transportation for migrants. They repeatedly provide this service for monetary gain. In contrast, the human beings transported by the coyotes are not in the business of human smuggling. They pay for a service; they make no “profit” from it, and they have a personal, not commercial motive, in crossing the border.

To read the statute as imposing criminal liability on the human cargo would, effectively, eliminate the requirement that the person prosecuted act “for profit” or for “commercial purpose.” Thus, such a reading would render those phrases “void” and “inert” and would ignore the legislative intent expressed through those words.

In this paragraph, the writer applies the law to the facts.

Accordingly, based on the plain meaning of the text in § 13-2319(a) the court will likely dismiss Count I of the indictment. Our client was not the smuggler. He was merely the human cargo. While the plain meaning of the statutory section demonstrates that the coyotes’ activity falls squarely within the intended scope of § 13-2319(a), the plain text also demonstrates that our clients’ activity as human cargo does not.

The writer moves on to the context of the statute.

**B. The context of §13-2319(a) demonstrates a legislative intent to make §13-2319(a) a tool for prosecutors to combat organized crime, not individual migrant activity.**

Which of these sources do you think are intrinsic and which are extrinsic?

If the court finds the plain meaning of §13-2319 ambiguous, the court may then look to the context, historical background, spirit and purpose of the statute to determine the legislative intent. *Blake v. Schwartz*, 42 P.3d 6, 12 (Ariz. Ct. App. 2002). As a part of this broadened analysis, the court may consider the headings of the statute to aid the interpretation of the statute and to ascertain legislative intent. *State v. Hauser*, 105 P.3d 1158, 1161 (Ariz. 2005).



The heading of §13-2319 demonstrates the Arizona State Legislature intended to target members of organized crime. Chapter 23 of the Arizona Criminal Code is entitled “Organized Crime, Fraud and Terrorism.” Ariz. Rev. Stat. Ann. §12-2301 (West 2005). This heading shows that the Arizona Legislature enacted §13-2319 to provide a remedy for the problems of organized crime, fraud, or terrorism.

The historical background to §13-2319 also supports the interpretation that the legislature intended to target organized crime, and not human cargo. In 2005, the year §13-2319 was passed in Arizona, the United States Government Accountability Office reported to Congress that “[p]eople smuggling is a huge and highly profitable business worldwide, involving billions of dollars annually.” Colleen DiSanto, *Alien Smuggling Along the Arizona-Mexico Border*, 43 Ariz. Att’y, January 1, 2007, at 29. At that time, the “volume and sophistication” of human smuggling rings had increased dramatically, and Arizona, which shares a border with Mexico, was already feeling the great weight of human smuggling by trafficking organizations. *Id.* Nevertheless, the same year §13-2319 was enacted, Arizona declared a state of emergency, due to the severe financial burden jailing thousands of illegal immigrants put on local border community economies. *Id.* at 32.

This historical background makes it unlikely that the Arizona Legislature intended individual migrant activity to be treated as a class four felony because it would increase jail time for smuggled migrants. Thus, the Legislature did not likely intend to increase jail time for illegal immigrants. A more natural interpretation of §13-2319, given this historical background, is that the statute is limited in its scope to coyotes and other members of human smuggling organizations, who smuggle immigrants for profit and are consistently responsible for the burden illegal immigrants put on the state of Arizona.

The spirit and purpose of the statute is also best served by interpreting §13-2319(a) to limit criminal liability to the coyote and other members of human smuggling organizations. According to a Senate fact sheet, the Arizona legislature created §13-2319 as a tool to help the state combat these human smuggling and trafficking organizations. Az. Sen. S.F. Sheet, 2005 Reg. Sess. S.B. 1372. Distinguishing the role of the coyote and other members of a smuggling organization from the role of the smuggled migrant serves that purpose. The coyote is a specialist employed by a smuggling organization to smuggle migrants across the border, and he plays an active role in human smuggle organizations. AZCentral, *Terms Used in the Human-Smuggling Business*, <http://www.azcentral.com/specials/special21/articles/0720Online-Drophouse-Terms.html> (July 23, 2006). On the other hand, a smuggled migrant takes a passive role, that of the commodity and his relationship with the smugglers “ends with the arrival of the migrant at his destination.” Ariz. Sen. S.F. Sheet, 2005 Reg. Sess. S.B. 1372. This distinguishable relationship is evidence that an interpretation of §13-2319 that limits its scope to coyotes properly serves the intended purpose of the statute while the coyotes’ human cargo should not be charged under §13-2319.

Here the writer again begins applying the law to her clients’ facts.

Our clients should not be prosecuted under §13-2319 because they are not members of human smuggling organizations. They are instead the commodities from which these criminal organizations profit. Our clients were nothing more than human cargo whose relationship ended “with the arrival of the migrant at his destination.” Our clients did not play an active role in getting across the border; instead, they merely submitted themselves to the smugglers for transport. The statute does not extend to cover our clients’ conduct.

Here, the writer concludes the issue.

The context, historical background, and purpose of §13-2319 support the interpretation that people in the business of human smuggling, not their human cargo, are the intended target of the statute. As a result, we can make a strong argument that the court should dismiss this charge against our clients.

Statutory analysis is a methodical process of reading, interpreting, and constructing a statute. Courts in your jurisdiction will expect you to analyze the statute in accordance with the method they espouse. Know the methodology your jurisdiction uses for statutory construction, and follow the steps of that process when analyzing the statute at issue and drafting a statutory analysis.

## Practice Points





- Statutory analysis is a multi-step process requiring you to critically read the statute, assess the ambiguities in the statute, and interpret the statute using intrinsic and extrinsic sources.
- The goal of statutory interpretation is always to construe the statute in the way the legislature intended.
- To properly interpret the statute, you must first know the methodology of statutory interpretation courts in the governing jurisdiction will use, whether that methodology is a fluid process or a clearly articulated two or three-level analysis.
- Evidence of legislative intent typically comes from three types of sources, intrinsic, extrinsic, or policy-based.
- Although courts will start with the plain meaning of a statute, most statutory analyses require a court to investigate additional sources of legislative intent through an analysis of intrinsic evidence, extrinsic evidence and canons of construction.

<sup>1</sup> Linda D. Jellum and David Charles Hricik, *Modern Statutory Interpretation: Problems, Theories, and Lawyering Strategies* 17 (Carolina Acad. Press 2006). Many thanks also go to Professors Steve Johansen and Anne Vilella for their guidance and wisdom on statutory interpretation and for reading numerous drafts of the chapter.

<sup>2</sup> Scholars typically use one of three following philosophies to guide statutory interpretation: (1) textualism (the statute's ordinary meaning should guide its interpretation), (2) purposivism (courts should interpret a statute in light of the purpose of the legislation), and (3) intentionalism (courts should interpret a statute in light of the intent of the specific legislature that enacted the statute). This chapter does not advocate one philosophy above the other, but tries to set forth information in a balanced manner.

<sup>3</sup> Bryan A. Garner, *A Dictionary of Modern Legal Usage* 48, 49, 920 (2d ed. Oxford Univ. Press 1995).

<sup>4</sup> David Mellinkoff, *Dictionary of American Legal Usage* 26, 670 (West 1992).

<sup>5</sup> Much of this chapter, including the examples of contextual canons, is derived from a handout, *A Basic Guide to Statutory Interpretation*, provided by Debbie Parker, Ruth Morton, and colleagues at Wake Forest University, 2000. The original author and date is unknown. (A copy is on file with the authors).

<sup>6</sup> See Jellum and Hricik, *supra* note 1, at 5-6.

<sup>7</sup> See, e.g., *P.G.E. v. Bureau of Labor and Indus.*, 859 P.2d 1143, 1145-47 (Or. 1993).

<sup>8</sup> *Id.* at 1145-47.

<sup>9</sup> See Jellum and Hricik, *supra* note 1, at 5-6.

<sup>10</sup> *Id.*

<sup>11</sup> Kent Greenawalt, *Legislation, Statutory Interpretation: 20 Questions* 206-09 (Foundation Press 1999).

<sup>12</sup> These examples of canons have been frequently used over the years. The original source of the examples is unknown.

<sup>13</sup> *Adams v. U.S.*, 979 F.2d 840 (Fed Cir. 1992).

<sup>14</sup> See, e.g., *Holcomb v. Sutherland*, 894 P.2d 457, 459-60 (Or. 1993).

<sup>15</sup> See George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 Duke L. J. 41-61 (1990).

<sup>16</sup> See Jellum and Hricik, *supra* note 1, at 409-13. The United States Supreme Court declared that agency interpretations of a statute were entitled to deference. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

<sup>17</sup> Costello, *supra* note 15, at 41.

<sup>18</sup> Greenawalt, *supra* note 11, at 206-09; Jellum & Hricik, *supra* note 1, at 429. Both sources rely on excerpts from Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules of Canon[sic] about How Statutes are to be Construed*, 3 Vand. L. Rev. 395, 401-06 (1949).

<sup>19</sup> Student sample by Alexis Curry, Lewis & Clark School of Law.

## The Discussion Section: Introducing and Connecting Legal Arguments

### I. Introduce Your Legal Argument: The Roadmap Section

A. State the Conclusion to Your Client's Legal Question

B. Explain the Governing Rule

C. Dispose of the Obvious and Uncontroversial (if Necessary)

D. Map and Assess the Remaining Arguments (if Necessary)

E. Conclude Again (if Necessary)

### II. Create Informative Point Headings

A. Make Point Headings "Work"

B. Restate the Conclusion After the Point Heading

C. Create Professional-Looking Point Headings

### III. Use Mini-Roadmaps to Introduce Sub-Arguments

You have now learned how to construct one legal argument: State your conclusion; explain the law on which that conclusion rests; show how that law applies to your client's case; and then restate your conclusion. That one legal argument is the essential building block in answering your client's legal question.

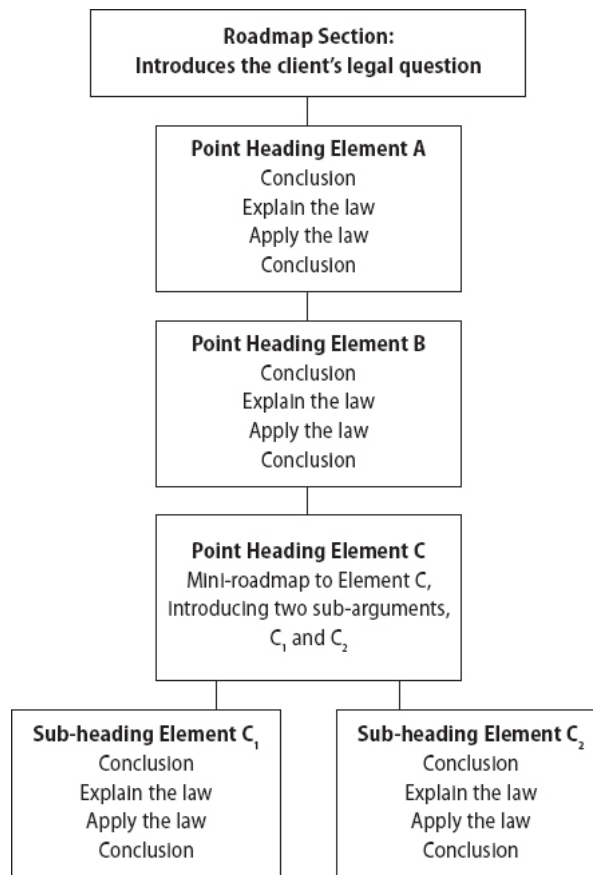
Usually, however, it takes more than one legal argument to address a client's legal question. As we discussed in [Chapter 4](#), *Finding Your Argument*, attorneys address a client's legal question by finding the governing rule and breaking down the governing rule into elements or factors. Each element or factor in the governing rule becomes the source of one or more legal arguments. We say "one or more" because some elements or factors in the governing rule can themselves be broken down into additional elements or factors. In that case, one element or factor in the governing rule may require more than one legal argument.

To answer your client's legal question, you will have to construct the necessary legal arguments and then string those arguments together within one discussion about your client's legal question. That discussion is presented in a section of your memo labeled (not surprisingly) the Discussion section.

To provide coherence to this string of legal arguments, attorneys write an introduction—or roadmap—to the discussion and then, as necessary, insert point headings and mini-roadmaps to guide their reader through. When they are done, their Discussion section might look something like [Figure 12-A](#), below.

Those tools—your introductory roadmap, point headings, and mini-roadmaps—identify the structure of your discussion and explain the relationship among the individual arguments. Allowing your reader to see the structure and how your arguments relate to each other will help your reader move more easily through your discussion. To that end, this chapter discusses how to construct an introduction and how to write effective point headings and mini-roadmaps.

**Figure 12-A • The discussion section diagrammed**



## **I. Introduce Your Legal Argument: The Roadmap Section**

Every discussion about a client's legal question begins with an introduction. In that introduction, you will tell your reader the conclusion you have reached about the client's legal question, explain the governing rule, dispense with arguments that will not be addressed, and then indicate the order in which the remaining legal arguments will appear. The introduction serves as a roadmap to the Discussion section, showing the discussion's starting point, its ending point, and the analytical route between the two. A clear roadmap section will make your discussion more cohesive and understandable for your reader.

### **A. State Your Conclusion to Your Client's Legal Question**

The roadmap section should begin with the ending: State your bottom-line conclusion to the client's legal question. Stating your conclusion reminds the reader of the issue and, simultaneously, tells the reader where your legal analysis is going.

Attorneys write the initial conclusion in a variety of ways. Sometimes you will state your conclusion and include a brief explanation of the critical fact or critical reason that supports the conclusion. Such a conclusion would look like [Example 12-B](#). Other times, you will simply assert your conclusion without further explanation, as in [Example 12-C](#).

#### **Example 12-B • Conclusion with reasoning explained**

Mr. Oliver can establish a prima facie case of retaliatory discharge under Michigan's Whistle-blowers' Protection Act since the evidence shows he was fired because he was about to report his employer's illegal use of lead-based paint.

#### **Example 12-C • Conclusion without reasoning explained**

Mr. Oliver can establish a prima facie case of retaliatory discharge under Michigan's Whistle-blowers' Protection Act.

Whether you identify a reason for your conclusion, as in [Example 12-B](#), or simply assert your conclusion, as in [Example 12-C](#), often depends on whether it is possible to quickly state a supporting reason. At the beginning of a legal argument, a reader can absorb only so many details. You will have to judge whether you can quickly explain the reason for your conclusion or whether it is better to let that reason develop over the course of your argument.

When the memo addresses a series of dispositive legal issues, your conclusion is more complex. In that case, first state the overall conclusion to your client's question. Then, state your conclusion for each separate legal issue. In [Example 12-D](#), the overall conclusion is that Mr. Jeffers has a viable claim for negligence. The overall conclusion is supported by conclusions to three dispositive legal issues: (1) the liability waiver is unenforceable because it is against public policy, (2) the waiver is also unenforceable because it does not conform to requirements established in state law, and (3) the urgent care facility acted negligently.

#### **Example 12-D • Conclusion for a multi-issue memo with reasoning explained**

Mr. Jeffers can bring a viable negligence claim against the urgent care facility for its treatment of his cycling injuries. First, a liability waiver is unenforceable when the underlying activity is in the public interest. Because medical care is a regulated service in the public interest, the liability waiver Mr. Jeffers signed is unenforceable. Second, the waiver is also unenforceable because it does not conform to the formatting and language requirement for liability releases under state case law. The language of the release was not clear, and the font size was too small to be read by an average person. Finally, Mr. Jeffers can prove that the urgent care facility acted negligently when it failed to use sterile instruments in his treatment.

No matter how many issues your memo addresses, the introduction should begin by telling the reader the ultimate conclusion you have reached.

### **B. Explain the Governing Rule**

After stating the conclusion, next explain the rule that governs the client's legal question. Doing so indicates the legal basis for your conclusion and the framework for your discussion.

#### **1. State the governing rule**

As you now know, the governing rule can be found in a variety of sources. Typically, you will find your governing rule in a statute or a judicial opinion. While your statement of the governing rule should echo the way that rule is set out in the primary source, your statement of the governing rule should also be clear.

When you write the governing rule you do not need to state it word for word as it is written in the statute or explained by the courts. Usually, statutes contain more language than is relevant to your client's question. In addition, statutes are sometimes written awkwardly. Even when the governing rule is rooted in case law, the way in which the courts describe the rule may not work as smoothly in your discussion. For all these reasons, attorneys do not mechanically copy the governing rule into their introduction.

Instead, your description of the governing rule should repeat key phrases, but you may modify language so that the governing rule is clearly explained and flows with the rest of your discussion. The next two examples, 12-E and 12-F, show how you might transform a governing rule that is difficult to read into one that is easier for your reader to absorb.

The first example, [Example 12-E](#), is the text of a Michigan statute that prohibits a public official from coercing public employees to make political contributions. In the example, the parts of the statute that are relevant to the client's case are shaded. Those parts will form the basis for the governing rule that is described in the introduction. The second example, [Example 12-F](#), shows how you might create a governing rule from the relevant parts of the statute.

#### **Example 12-E • Michigan statute prohibiting coerced political contributions**

##### **Michigan Compiled Law §15.405**

Sec. 5. A public employer, public employee or an elected or appointed official may not personally, or through an agent, coerce, attempt to coerce, or command another public employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for the benefit of a person seeking or holding elected office, or for the purpose of furthering or defeating a proposed law, ballot question, or other measure that may be submitted to a vote of the electors.

#### **Example 12-F • A governing rule derived from a statute**

The state will be able to establish that Councilmember Bennett coerced or attempted to coerce Ms. Larsen to contribute money to an organization established to benefit Councilman Bennett. Under Michigan law, an elected official may not coerce or attempt to coerce a public employee to contribute anything of value to an organization for the benefit of a person holding elected office or for the purpose of furthering or defeating a proposed law. Mich. Comp. Laws §15.405 (2005).

When you are drafting the governing rule, you will have two competing goals. On the one hand, you want to educate your reader about the language used to discuss the issue. Therefore, you will want to reproduce the language that the statute or courts use. On the other hand, you will want your description to be clear. These goals are often in tension with each other.

You have some options. If the way in which the statute or the courts discuss the governing rule is confusing, you can repeat the rule (with the confusing language) to introduce the language, and then in a sentence or two, clarify the meaning. Alternatively, you can reframe the governing rule in a way that is clearer. If you reframe the rule in a new way, you may want to provide the exact language (either from the statute or that the courts typically use) in a footnote so that your reader can see the origin of your language.

## **2. Explain how courts interpret or apply the governing rule**

When describing the governing rule, you should also describe any rules or policies that affect how courts interpret or apply the governing rule, if that will be relevant to your legal analysis. For example, you might explain the legislative reason behind the statute; the burden of proof, that is how much evidence a party must bring forward; how the courts balance factors in the governing rule; or presumptions the courts apply when interpreting the rule. In [Example 12-G](#), the introduction explains how courts understand the governing rule.

#### **Example 12-G • Governing rule stated, then explained**

Conclusion

Background information

#### Governing rule

Our client has a viable claim for unjust enrichment. In Oregon, the theory of unjust enrichment provides an exception to the state’s usual rule that improvements to rented space typically become the property of the landlord and a tenant may not recover for those improvements. *W.H. Shields v. Or. Dept. of Revenue*, 513 P.2d 784, 789 (Or. 1973); *Gourley v. O'Donnell*, 626 P.2d 367, 371 (Or. Ct. App. 1981). Under the unjust enrichment theory, restitution is available when denying such restitution would work an excessively harsh result on the tenant or provide an unreasonable windfall to the owner. *Kerr v. Miller*, 977 P.2d 438, 445 (Or. Ct. App. 1999). Courts determine whether a tenant is entitled to restitution based on an assessment of the equities as a whole, in light of the circumstances of the particular case. *Id.* In this case, our client has a strong claim for unjust enrichment because permitting the landlord to retain nearly \$60,000 in improvements on a \$700 per month lease would provide the landlord with an unreasonable windfall.

Explanation of how courts understand and apply the governing rule

Conclusion again. The conclusion also maps the discussion ahead.

Be careful, however, to distinguish between those rules and policies that affect the governing rule as a whole and those that affect only one element or factor. The introduction is the place to discuss rules and policies relevant to the *entire* governing rule. If a rule or policy affects only one element or factor, discuss that rule or policy in your legal argument about that one element or factor. Do not muddle your discussion by including information in your introduction that is relevant to only one element or factor.

### 3. Provide necessary background information

In the introductory roadmap section, you may also need to include background information to provide context for the governing rule and the legal question being addressed. For example, in [Example 12-G](#), above, the introduction explains that the theory of unjust enrichment is an exception to the usual rule that tenants will not be compensated for improvements to a rental property. That information—that the governing rule is an exception—is helpful background information because it explains the relationship between the governing rule and the larger body of law.

### C. Dispose of the Obvious and Uncontroversial (if Necessary)

In some arguments, you will address every element in the governing rule. If that is the case, you would not need to dispose of any elements. (If you are working on such an Argument, skip the rest of this section and go to the next section.)

Sometimes, however, an element or factor in the governing rule does not warrant a full legal argument. In that case, you can dispose of that element or factor in the roadmap section.

An element or factor does not warrant a full legal argument if (1) research shows the element is clearly met, *and* (2) your reader can easily see how the element is met.

The roadmap in [Example 12-H](#), which follows, shows how you might quickly dispose of a legal argument in your introduction. The example addresses whether a councilmember has coerced a public employee to act on the councilmember’s behalf. It quickly disposes of one element—whether the plaintiff was a “public employee”—by providing the definition of a “public employee” and the facts that show the plaintiff was clearly a public employee. Because the element is clearly met and that conclusion will raise no questions in the reader’s mind, no further discussion is necessary.

#### Example 12-H • Disposing of elements that may not warrant a full legal discussion

##### Conclusion

Ms. Larsen will probably not be able to establish that Councilmember Bennett coerced Ms. Larsen to contribute something of value to an organization for Councilmember Bennett’s benefit. Under Michigan law, an elected official may not coerce or attempt to coerce a public employee to contribute anything of value to an organization for the benefit of a person holding elected office or for the purpose of furthering or defeating a proposed law. Mich. Comp. Laws §15.405 (2005).

Disposing of an element that does not warrant a full legal discussion

In this case, Ms. Larsen is a public employee. A public employee is defined as “an employee of the state classified civil service.” Mich. Comp. Laws §15.401. Ms. Larsen took her civil service exam in 1973 and is a Grade 14 employee, employed in the Office of the Secretary of State.

The introduction maps the elements that remain and, therefore, the elements that will be discussed in the remainder of the memo.

The remaining portion of the statute raises four issues. First, Ms. Larsen can probably show that she contributed something of value to the organization “Save Our Downtown” because she held the Secretary of State’s office open an additional 15 minutes on the evening ballot measures were due. Moreover, that act could likely be construed to be “for the benefit” of Councilmember Bennett because he publicly supported the measure. That act can also be construed as “furthering ... a proposed law” because, had she not held the office open, the measure would not have made it on the ballot. However, Ms. Larsen will not be able to prove that Councilmember Bennett coerced Ms. Larsen to act. Thus, she will not be able to establish a claim under the statute.

Your discussion may not address an element or factor in the governing rule for other reasons—perhaps you were asked to address only a sub-set of the elements or perhaps you do not have access to sufficient information to address one of the elements or factors. No matter what the reason, if an element or factor in the governing rule is not addressed in a full legal argument, your roadmap section should indicate why not so that your reader is not surprised by its absence.

#### **D. Map and Assess the Remaining Arguments (if Necessary)**

Your reader will also expect the introduction to tell her the order of the legal arguments that are to come. That map of the arguments to come will be particularly helpful if you assess those arguments: Will there be one element that will be particularly difficult to prove? Is there one factor that is more important than the others? Let’s look at some different situations and how you might map and assess the remainder.

If you have not disposed of any elements, then your governing rule might act as the map of the remaining arguments. Remember, the governing rule lists the elements and factors that need to be addressed to resolve a client’s question. Your reader—an attorney—knows that and looks for the elements and factors while reading the governing rule. Your reader then assumes that the order of your legal arguments will follow the order of the governing rule.

If the order of your discussion follows the order in which the elements appear in the governing rule, then you need do nothing further to indicate the organization in the remainder of your discussion. The governing rule has already told your reader the order ahead. Sometimes, an attorney will end the introduction here and turn to the first legal argument, as in [Example 12-I](#).

#### **Example 12-I • Governing rule acts as a map of the discussion**

The Workers’ Compensation Board improperly denied workers’ compensation benefits to Mr. Mark Gator, and its decision should be reversed. Under California law, a person injured during an off-duty recreational activity is entitled to workers’ compensation if the activity was a reasonable expectancy of employment. Cal. Lab. Code Ann. § 3600(a)(9) (West 2003). An activity is a reasonable expectancy of employment if (1) the employee subjectively believed he was required to participate in the activity, and (2) the employee’s belief was objectively reasonable. *Meyer v. Workers’ Comp. App. Bd.*, 204 Cal. Rptr. 74, 76 (Cal. App. 4th Dist. 1984).

##### **A. Mark Gator Subjectively Believed He was Required to Play Paddleball with His Boss.**

The standard for establishing an employee’s subjective belief is a “lax standard.” *Aetna Cas. & Sur. Co. v. Workers’ Comp. App. Bd.*, 232 Cal. Rptr. 257, 263 (Cal. App. 5th Dist. 1986).

Sometimes, however, you cannot rely on the governing rule to map the order of the arguments to come. For example, if you dispose of one or more aspects of the governing rule, your reader will want to know what’s left. Rather than forcing your reader to return to the governing rule and figure out what’s left, do that work for her. The last paragraph of example 12-H, above, shows you one way to map and assess the remaining arguments after disposing of one or more elements in the governing rule.



Other times, you will want to map the remaining arguments because you have decided that one element or factor is so important that it should be discussed first. An element might address an important threshold question, or you might simply decide that it makes sense to address the elements in an order different from the order presented in the governing rule.

Whatever the reason, if the order in which you discuss the elements is different from the order in which the governing rule presents them, be sure to explain your chosen order and *why* you have chosen that order. Remember that your reader expects your discussion to follow the order of the governing rule. If your discussion does not, your reader will become confused and may think that *you* are confused and that your discussion is disorganized.

#### **E. Conclude Again (if Necessary)**

Some attorneys state their conclusion again at the bottom of their roadmap section to be more specific about why an argument will succeed or fail. For example, in [Example 12-G](#), the attorney finishes with a more specific conclusion. First, the attorney explained that the plaintiff's claim for unjust enrichment will succeed only if he can prove either that denying restitution would work an excessively harsh result or an unreasonable windfall to the defendant. The conclusion at the end of the introduction specifies that, in that case, denying restitution would be an unreasonable windfall.

You may also want to re-state your conclusion when your roadmap section is long. If you have provided a lot of information to your reader, you may want to remind your reader of your conclusion before moving on to discuss individual legal arguments. As a rough guide, if your introduction is longer than half a page, consider re-stating your conclusion.

Sometimes, however, you will choose to end the roadmap section by simply listing the issues that will be addressed and their order, as in [Example 12-H](#).

No rule tells us when the introduction should end with a conclusion. Rather, you will need to judge whether your reader will be helped by seeing the conclusion restated before moving on.



## II. Create Informative Point Headings

After completing the roadmap section, you will likely have a point heading introducing an individual legal argument. Point headings indicate the individual legal arguments, but they also perform other important work for your reader. First, point headings tell the reader the bottom-line conclusion of the upcoming section. Second, point headings visually break up blocks of text and give the reader a “landing spot.” At each landing spot, the reader can digest the material she just read and prepare for the next topic.

Finally, point headings function as a table of contents for the reader, giving a sense of the main points and the order in which those points will be presented. Although your reader may read through the whole memo once, when your reader uses the memo—whether to talk to a client or to draft a motion to a court—your reader will jump to different sections in your memo as she needs information from that section. The point headings will allow her to quickly find the argument that she seeks.

### A. Make Point Headings “Work”

For point headings to actually perform their work, they should describe two things:

1. **Your conclusion to the section, and**
2. **The primary reason for your conclusion.**

When describing the conclusion and the primary reason for it, you might also include the rule governing the issue, the determinative facts from your client’s case, or a combination of rule and facts.

[Example 12-J](#) is an effective point heading. It describes the conclusion of the section (that the Neros “actually possessed” the land), the legal support for the conclusion (that they used the land as owners would), and the determinative facts (that they maintained a fence line and harvested crops). With this information, the reader can understand the conclusion to the legal argument, as well as the law and facts that support it.

#### **Example 12-J • Effective point heading**

**A. The Neros “actually possessed” the land because they used the land as an owner would by maintaining a fence and harvesting fruit trees.**

Sometimes, you will not be able to include all the information that you might like to include. If length is an issue, choose clarity over completeness. A reader should be able to glance down at a point heading and quickly pick out the main point. If the reason or facts require too much text, your reader will not be able to pick out your main point, so you will need to scale back your point heading. In that case, you might include your conclusion with just a short statement of the law that supports your conclusion and omit the facts, as in [Example 12-K](#).

#### **Example 12-K • Effective, shorter point heading**

**A. The Neros “actually possessed” the land because they used the land as an owner would.**

Also, you might include your conclusion and the key facts that support that conclusion without the reason, as in [Example 12-L](#). Sometimes, you might simply state your conclusion, as in [Example 12-M](#).

#### **Example 12-L • Another effective, shorter point heading**

**A. The Neros “actually possessed” the land because they maintained a fence line and harvested the crop of fruit trees.**

#### **Example 12-M • Another effective, shorter point heading**

**A. The Neros “actually possessed” the land.**

Determining how much information to put in your point heading is a judgment call. Although ideally you would include your conclusion, the support for your conclusion, and the specific facts that led you to that conclusion, you must consider whether including all that information will still allow your point heading to function effectively. If the reader cannot see the main point quickly, leave out the additional information.

Although you may shorten the information included in your point heading, at a minimum, you must state your conclusion. Some point headings are “lazy.” Rather than explaining the conclusion and the reason for it, lazy headings just mention the topic that will be covered in the section. [Example 12-N](#) illustrates a lazy point heading.

#### **Example 12-N • A lazy point heading**

##### **A. Actual possession.**

Although the point heading in [Example 12-N](#) notifies the reader of the element about to be discussed, it does not tell the reader the ultimate conclusion of the section, nor does it give any determinative facts or legal reasoning. The heading is a “placeholder,” but it does not *work*. Since attorneys value clarity and conciseness, make every word count and make every heading work.

##### **B. Restate the Conclusion after the Point Heading**

If you use point headings, you may wonder whether you should state your conclusion in the point heading and then immediately restate that same conclusion in the first sentence of the argument that follows. Often, the answer is yes.

Attorneys frequently state the conclusion to a legal argument three times: once in the point heading, a second time in the first sentence of the legal argument, and a third time at the end of the argument. The attorney may even state the conclusion a fourth time at the beginning of the application section.

Overkill? Not usually. Attorneys want to make sure the reader knows where the discussion is headed, and at the end, attorneys want to make sure they have driven home their point.

Stating the conclusion in a point heading and then in the text may seem overly repetitive; however, readers sometimes skip over point headings, moving from paragraph to paragraph. So, your reader may not see your point heading. On the other hand, you do not want to omit the point headings because your reader will need them when searching for a particular argument within your memo.

To avoid the repetitive feel of stating your conclusion in the point heading and again in your first sentence of your legal argument, simply revise your conclusion slightly so that you are not using the exact same words. [Example 12-O](#) shows how you can modify your point heading so that it does not seem overly repetitious.

#### **Example 12-O • Point heading and conclusion**

##### **A. The Neros “actually possessed” the land because they used the land as an owner would by maintaining a fence line and harvesting the fruit trees.**

The Neros can prove that they actually possessed the land. A person proves actual possession by....

Although we would recommend that you state your conclusion in both the point heading and the first sentence of your legal argument, not all attorneys do so. When you begin your legal career, you might look at samples in your law office to see what the attorneys in your office do. Then, as you read more legal writing, watch what other attorneys do and gauge your own likes and dislikes. As you gain more experience, you’ll be able to make a better determination about what will be most helpful to your reader.

##### **C. Create Professional-Looking Point Headings**

Your memo makes an impression by the way it looks, and the point headings will contribute to that impression. Creating professional-looking point headings takes only a few steps.

First, start with a traditional outline format. [Example 12-P](#) illustrates a traditional outline format.

### **Example 12-P • A traditional outline**

#### **I. Point Headings Assert a Conclusion That the Writer Believes the Court Will Adopt.**

**A. Roman numerals are used for dispositive point headings, while capital letters are used to identify individual legal arguments.**

a. Underlining is used for sub-issues within one legal argument.

b. Notice how point headings convey, graphically, the hierarchy of an argument.

**B. Each point heading should be one sentence that is not too long to be absorbed.**

#### **II. Point Headings Should Provide a Skeletal Outline of Your Arguments.**

In legal writing, Roman numerals designate dispositive legal issues. If your discussion addresses only one legal issue, your outline may begin with the capital letter A.

Each point heading should be in a legible font and set out so that it stands out from your main text. If the formatting requirements of your office do not require it, do not use all caps in point headings for memoranda or internal documents. As you can see in [Example 12-Q](#), all caps are difficult to read.

### **Example 12-Q • All caps are difficult to read**

**A. THE NEROS “ACTUALLY POSSESSED” THE LAND BECAUSE THEY USED THE LAND AS AN OWNER WOULD BY MAINTAINING A FENCE LINE AND HARVESTING THE CROP OF FRUIT TREES.**

Finally, use a “hanging indent.” That is, the first word of the second line should align with the first word in the first line, not with the signpost letter or numeral. [Example 12-Q](#), although difficult to read because of the all caps, uses a hanging indent. [Example 12-R](#) does not.

### **Example 12-R • Point heading without a hanging indent**

If a hanging indent were used, the text would align along the vertical line.

**A. The Neros “actually possessed” the land because they used the land as an owner would by maintaining a fence line and harvesting the crop of fruit trees.**

### III. Use Mini-Roadmaps to Introduce Sub-Arguments

Typically, one element or factor in a governing rule will be explored with one legal argument. Sometimes, however, an element or factor in the governing rule requires more than one argument. When it does, you will need a mini-roadmap to alert your reader to the upcoming structure and to give your reader context for the issues being explored.

A mini-roadmap does for one element or factor what the roadmap section does for your discussion as a whole: It sets out the governing rule for one element or factor, lets the reader know which elements or factors within that rule will be discussed (or disposed of), states the order in which the remaining elements or factors will be discussed, and gives your bottom-line conclusion on the issue.

Take, for example, the fourth element in a claim for adverse possession: hostility. A plaintiff can prove hostility in one of two ways. A plaintiff can establish a “pure mistake” or a “subjective intent” to take possession of the land. Because the element “hostility” can be proven in two ways, the attorney needs to explore whether both those avenues are open to his client and explain why or why not. As a result, explaining the one element of hostility will require two legal arguments.

A mini-roadmap in [Example 12-S](#) alerts the reader that the discussion about hostility will require two legal arguments, rather than just one, as is ordinarily the case.

#### Example 12-S • Mini-roadmap alerts reader to upcoming structure

Fourth, the Neros must establish that their use of the disputed property was hostile. To prove hostility, the plaintiffs must have used the disputed land intending to occupy the land as its true owners and not in subordination to the true owner. *Faulconer v. Williams*, 964 P.2d 246, 252 (Or. 1998). Plaintiffs can prove hostility in two ways. *Hoffman*, 994 P.2d at 110. Plaintiffs can establish that “possession was under an honest but mistaken belief of ownership.” *Id.* at 110 n. 4. This rule is the “pure mistake” doctrine. *Id.* Alternatively, plaintiffs can establish that, subjectively, they intended to deprive the owners of ownership. *Faulconer*, 964 P.2d at 251.

A mini-roadmap alerts the reader to two upcoming arguments.

Each argument is then explored in the order in which they were presented in the mini-roadmap.

The Neros will very likely be able to prove “pure mistake”....

In the alternative, if Ms. Welch and Mr. Bruce find a neighbor to testify to any doubt by the Neros during the 12-year period, then the Neros would have to prove hostility through their subjective intent to own the land....

In [Example 12-T](#), which omits the mini-roadmap, the reader will not understand how the two arguments that follow relate to any of the prior arguments. A mini-roadmap spares the reader from confusion by clarifying both the law that applies to the element and the structure of the arguments that follow.

#### Example 12-T • No mini-roadmap to alert reader to the upcoming structure

Fourth, the Neros must establish that their use of the disputed property was hostile. To prove hostility, the plaintiffs must have used the disputed land intending to occupy the land as its true owners and not in subordination to the true owner. *Faulconer v. Williams*, 964 P.2d 246, 252 (Or. 1998).

The Neros will very likely be able to prove “pure mistake”.... Plaintiffs can establish a pure mistake when the “possession was under an honest but mistaken belief of ownership.” *Hoffman*, 994 P.2d at 110....

Without a roadmap, the reader will be surprised by this alternative argument.

In the alternative, if Ms. Welch and Mr. Bruce find a neighbor to testify to any doubt by the Neros during the 12-year period, then the Neros would have to prove hostility through their subjective intent to own the land....

As in your introductory roadmap section, you can also use a mini-roadmap if an element requires two arguments and you dispose of one. [Example 12-U](#) does just that.

#### Example 12-U • Mini-roadmap identifies two arguments and then disposes of one of them

A mini-roadmap identifies two ways to prove possession is “open and notorious,” disposes of one (actual notice), and identifies the remaining argument (constructive notice).

After proving actual possession, the Neros will have to demonstrate that their possession of the land was open and notorious. To prove that their possession was open and notorious, the plaintiffs must prove that the owners had notice that they were asserting title to the disputed property. *E.g.*, *Slak*, 875 P.2d at 519. The notice may be actual or constructive. *Id.* Owners have actual notice when they are aware that their claim of the land is being challenged. *See id.* Because Ms. Cramer was unaware that the Neros were asserting a claim to the disputed land, she did not have actual notice. Instead, the Neros must prove that they gave constructive notice of their possession.

The Neros can probably establish constructive notice because they built a fence on the purported boundary and used the land extensively and openly.

The Discussion section in your memorandum will require you to bring together a series of legal arguments. To effectively present those arguments, you will have to help your reader clearly see your organizational structure. You can do that through an introductory roadmap section, point headings, and mini-roadmaps along the way.

The primary goal in a memorandum is to communicate your legal analysis clearly and succinctly. The more legal arguments you present in one document, the clearer you must be about your organizational structure and the relationship among your arguments.

### Practice Points



- Give the reader a roadmap to your memorandum with an introductory section that establishes your conclusion to the issue, explains the governing rule, dispenses with arguments that will not be addressed, and indicates the order in which the remaining arguments will appear.
- Restate your conclusion at the beginning and, if you think it is necessary, again at the end of the roadmap section.
- A working point heading reflects your legal conclusion and the reasons for that conclusion. Together, point headings should reflect the main points of your argument and how those points fit together.
- Well-formatted point headings will reinforce the professionalism of your work product.
- A mini-roadmap at the beginning of an individual legal argument will help orient your reader when an element or factor needs to be addressed with more than one legal argument. A mini-roadmap performs the same functions as your introductory roadmap, but it does so for a subsection of your discussion.

## Chapter 13

# Question Presented and Brief Answer

[I. The Role of a Question Presented and Brief Answer](#)

[II. The Form of a Question Presented and Brief Answer](#)

[III. Writing a Question Presented](#)

[A. Structuring the Question Presented](#)

[B. Tools for Drafting an Effective Question Presented](#)

[IV. Writing a Brief Answer](#)

Busy people like quick answers. As a result, your memorandum should begin by stating the legal issue your memo will address and your ultimate conclusion, respectively, in a Question Presented and Brief Answer. The Question Presented sets forth the precise legal question your client needs answered. The Brief Answer then provides the bottom-line answer to that question and a few of the critical reasons that support your conclusion. Together, the Question Presented and Brief Answer will describe the analytical crux of your argument.

Both the Question Presented and the Brief Answer must convey a great amount of information concisely and precisely. Because you are distilling much information into a short statement, both the Question Presented and the Brief Answer can be challenging to write. These sections contain valuable information, however, and are the first part of your memo the supervising attorney will read, so you must learn to draft these sections well.

## **I. The Role of a Question Presented and Brief Answer**

The Question Presented and Brief Answer serve three purposes. First, the Question Presented and Brief Answer are time-management devices. They allow your supervising attorney to quickly determine the question addressed in the memo, the answer to it, and the basis for that answer, even if she does not have time to read your entire analysis at just that moment.

Second, the Question Presented and Brief Answer make your detailed analysis easier to absorb. Every reader is subconsciously asking, “Why should I bother reading this material?” The reader wants to know why the details matter and how the details relate to the larger picture. The Question Presented and Brief Answer tell the reader why the material should be read. Once the reader knows the legal question addressed and the final answer, the reader can understand *why* those details in the memorandum matter and *how* those details relate to the client’s question.

Finally, these sections are an aid to future colleagues. Law offices often catalog memos so that future attorneys do not have to re-create work that has already been created. When a similar issue subsequently arises, an attorney can simply pull the old memorandum and look at the Question Presented and Brief Answer to see whether it examines the same legal issue. The old memorandum will probably not answer the new question completely, and the research will certainly have to be updated; however, the old memorandum will give a good starting point for the attorney’s research and analysis of the new problem, saving the attorney time and the client money.

## II. The Form of a Question Presented and Brief Answer

Questions Presented and Brief Answers take many forms from workplace to workplace. They may have different names, such as Issue Presented and Conclusion, and the style in which each part is presented may differ as well. So, when you begin working in a new law office or if you begin working with a new senior attorney in that office, you should ask for a sample memo and follow whatever form your office or the senior attorney prefers.

You can see two typical formats for a Question Presented and Brief Answer in [Examples 13-A](#) and [13-B](#). Although named and structured differently, both describe the precise legal question the memo will address and state a conclusion to that question. They accomplish the same goal.

### Example 13-A • A typical Question Presented and Brief Answer

#### QUESTION PRESENTED

The Question Presented describes the legal question and the critical facts from the client's case on which the question will turn.

Under Oregon law, which allows a defendant's statement into evidence if the statement was made during "mere conversation," will Mr. Adams's statement be admissible when he made the statement after the undercover officer parked an unmarked police car behind Mr. Adams's car and Mr. Adams told the officer he was not yet planning to leave?

#### BRIEF ANSWER

The Brief Answer provides an answer to the question and states the key rule on which the answer is based.

Yes. The statement will be admissible against Mr. Adams. Evidence is admissible against a defendant if it is gathered during "mere conversation" rather than during a "stop." An officer stops another individual only if that individual could reasonably believe that his liberty was being restrained. Mr. Adams could not reasonably believe that his liberty was being restrained. Therefore, Mr. Adams's statement will likely be admissible.

### Example 13-B • A typical Question Presented and Brief Answer with different labels

#### ISSUE STATEMENT

The Issue Statement (the Question Presented) describes the critical facts from the client's case and the legal question.

Our client, Paul Adams, made a statement to an undercover officer that implicates him in a local robbery. He made the statement after the undercover officer parked his unmarked police car behind his car. When the officer asked if he was planning to leave, Mr. Adams said "no." Under Oregon law, which allows such evidence to be admitted if the encounter is "mere conversation," will Mr. Adams's statement be admissible?

#### CONCLUSION

The Conclusion (the Brief Answer) provides an answer to the question and explains the key reasons for that conclusion.

Yes. The statement will likely be admissible. Oregon law says that evidence gathered during "mere conversation" as opposed to a "stop" is admissible. A person is stopped only if he could reasonably believe that his liberty was being restrained. Mr. Adams could not reasonably believe that his liberty was being restrained. Therefore, his statement likely will be admissible against him.

No matter how the Question Presented and Brief Answer are named or styled, they should convey the vital information an attorney expects.



### III. Writing a Question Presented

A proper Question Presented has three parts: a description of the specific governing law and its jurisdiction, the precise legal question, and the most determinative facts giving rise to the question. Together, these parts ask, “What legal question is presented by these facts?” While the language and format in which you present these parts can vary, make sure that your Question Presented has all three parts.

Because the Question Presented is the first section your reader encounters, the focus of the question must be clear and all essential information must be included.

#### A. Structuring the Question Presented

The easiest way to structure your Question Presented is in one of two formats: the under/does/when<sup>1</sup> format or the statements-and-question format.<sup>2</sup> Look at how each format works.

##### 1. Structuring a Question Presented with under/does/when

The under/does/when format presents the three vital parts of a Question Presented in one sentence. This format works this way:

**Under** [this controlling law—give jurisdiction, the law, and what the law allows or prohibits]

**Does/Is/Can** [this legal consequence occur]

**When** [these determinative facts are present]?

In this format, you will move from the controlling law to listing determinative facts. Notice each of the parts in [Example 13-C](#).<sup>3</sup>

##### Example 13-C • Under/does/when format

#### QUESTION PRESENTED

**Under** South Dakota statutory law, which prohibits a third party from seducing another man’s spouse, **is** the third party liable for alienating the spouse’s affections **when** he sends her flowers, notes, and invites her out on dates while she was contemplating a marital separation from her husband?

Each component of the under/does/when format gives the reader valuable information. The reader needs all three parts to fully understand the question you are posing.

(a) “Under” the controlling law

In the “under” section, you tell the reader the controlling jurisdiction and the law that governs the client’s question. When describing the law that governs the client’s question, be careful to provide enough information so that the reader can quickly understand the purpose of the law. For example, in [Example 13-D](#), the reader does not have enough information to understand what law controls the client’s question because only the statutory number is given.

##### Example 13-D • “Under” part of Question Presented not developed

#### QUESTION PRESENTED

**Under** § 20-9-7 (2007), can a husband bring a claim against his wife’s alleged paramour for sending his wife flowers, notes, and inviting her out on dates, **when** at the same time the wife was contemplating a marital separation?

Having read [Example 13-D](#), answer these questions: Does the question address a federal or state law? If the latter, which state? And, what exactly does § 20-9-7 prohibit or require? Without additional information, the reader may not understand what jurisdiction controls the analysis, or even worse, the reader may not immediately understand the exact law being evaluated.

In [Example 13-D](#), the reader may eventually figure out that the statutory section cited gives a cause of action for alienation of affections; however, the *reader* should not have to work to figure out this information. If you reference an authority, immediately explain what that authority provides.

Now look at [Example 13-E](#) to see a question presented with the “under” part more developed.

### Example 13-E • “Under” part of Question Presented is well developed

#### QUESTION PRESENTED

**Under** South Dakota’s § 20-9-7 (2007), which prohibits enticing a wife from her husband, can a husband bring a claim against his wife’s alleged paramour for sending his wife flowers, notes, and inviting her out on dates, when at the same time the wife was contemplating a marital separation?

After reading the Question Presented in [Example 13-E](#), the reader has valuable information. He knows what jurisdiction controls, and he knows what law governs the client’s question.

You will have to use your own good judgment in deciding the level of specificity needed in the “under” section. For example, although you will often want to include a statutory section, you may decide to describe the statute that controls, and leave the citation to the statutory section for later, as in [Example 13-C](#), above. Similarly, when the Question Presented involves a common law claim, you will simply name the common law claim. Usually, the name itself describes the law that controls, as in [Example 13-F](#).

### Example 13-F • “Under” part of Question Presented is well developed

#### Question Presented

**Under** North Carolina’s common law, which prohibits intentional infliction of emotional distress, does a businessman recover for emotional distress when a former relative posts to the Internet accusations of sexual and financial misconduct, causing the businessman to lose an important client and seek psychiatric treatment?

(b) “Does/Is/Can” this question or legal consequence occur

The “does” part of the Question Presented is straightforward. This part, illustrated in [Example 13-G](#), explains what precise legal question is being asked. Be as specific and precise as possible in stating the legal question.

### Example 13-G • Examples of “does” part of the Question Presented

“... **does** a police officer violate §1983 when....”

“... **is** a paramour liable for alienating the affections of another man’s wife when....”

“... **can** a husband establish a claim for alienation of affections when....”

(c) “When” these legally significant facts occurred

In addition to describing the legal question, you will need to explain the facts that will determine the outcome in your client’s case. Those facts are the legally significant facts. You will not, however, be able to include all of the legally significant facts.

Your Question Presented has to remain brief so that it is a quick and understandable summary. Generally, two or three legally significant facts will be all you can use without sacrificing clarity.

When the desire to include facts conflicts with the need to keep the summary short, you will simply have some hard choices to make: Of the many facts that will have an influence on the court, which will be *most* legally significant? List the most important facts on which the court will base its decision. Choose only those two or three facts most determinative to the issue. Compare [Example 13-H](#) with [Example 13-I](#) to see how too many facts convolute the question.

### Example 13-H • Too many facts included in Question Presented

#### QUESTION PRESENTED

Under South Dakota statutory law, which prohibits a third party from seducing another man’s spouse, is a paramour liable for alienating the wife’s affections **when** he sent her flowers on three occasions, wrote her amorous notes, took her out on several dates, and called her daily for three months, when she and her husband were already having problems and thinking about separating, but were still cohabitating and seeing a marriage counselor?

### Example 13-I • Only the determinative facts included

#### QUESTION PRESENTED

Under South Dakota statutory law, which prohibits a third party from seducing another man's spouse, is the third party liable for alienating the wife's affections **when** he sent her flowers, notes, and invited her out on dates while she was contemplating a marital separation from her husband?

(d) Vary the order of the three parts if it makes the Question Presented clearer

Although presenting the three parts in the under/does/when order may be easiest, you can alter the order if doing so makes the question easier for your reader to understand. [Example 13-J](#) shows how.

**Example 13-J • Under/does/when re-ordered**

**QUESTION PRESENTED**

When a married couple is separated and a third party sends flowers, asks the wife out on dates, and writes her notes, is the third party liable for alienation of affections **under** South Dakota law, which prohibits the seduction of a wife away from her husband?

**2. Structuring a Question Presented with statements and a question**

Many attorneys present their Question Presented in one sentence. Some attorneys, however, use several sentences to describe the Question Presented. In this alternative format, the attorney will describe the determinative facts and then pose the legal question under the controlling law.

This format is less confining than the previous under/does/when format because you can use several sentences to convey the Question Presented. Although you are not confined to writing one sentence with this format, you should not write too many sentences. Two or three sentences, then the legal question, should suffice. Clarity and conciseness are still the goals in this format.

Even though you have more structural freedom, you must still tell the reader the three vital parts of the question—the exact controlling law, the precise legal question, and the determinative facts on which the question will turn. You can see each of these parts in [Example 13-K](#).

**Example 13-K • A Question Presented structured with statements and a question**

**QUESTION PRESENTED**

The **determinative facts** are described in the first three sentences.

The **controlling law** and the **legal question** are identified in the final sentence.

Our client, Paul Adams, made a statement to an undercover officer that implicates him in a local robbery. He made the statement after the undercover officer parked his unmarked police car behind Mr. Adams's car. When the officer asked if he was planning to leave, Mr. Adams said "no." Under Oregon law, which allows such evidence to be admitted if the encounter was "mere conversation," will Mr. Adams's statement be admissible at trial?

(a) Describe the determinative facts in chronological order

If you use a statement-and-question format, you should begin by presenting the determinative facts. Again, select the most important facts a court would use to decide the legal question.

When presenting the determinative facts, present them chronologically. Readers assume that facts will be presented chronologically. When facts are not presented chronologically, readers often stumble and become confused as they try to sort out the chronology of events. Read [Example 13-L](#) to see how a random factual chronology can be confusing to the reader.

**Example 13-L • Facts presented in random order are difficult to absorb**

**QUESTION PRESENTED**

Mr. Adams made a statement to an undercover officer that implicated him in a local bank robbery. Beforehand, Mr. Adams told Officer Ephgrave he was not planning to leave after Officer Ephgrave parked his unmarked car behind Mr. Adams's car. Under Oregon law, which allows statements into evidence if made during "mere conversation," will Mr. Adams's statement be admissible?

Avoid the confusion. State the facts chronologically.

(b) Describe the controlling law and pose the legal question

You can describe the controlling law and the question being asked in one of two ways. After describing the facts in one or more sentences, you can combine the controlling law with the precise legal question in the last sentence of the Question Presented (see [Example 13-M](#)). Alternatively, you can divide these two parts and state the controlling law in the first sentence of your question presented and the legal question being asked in the last (see [Example 13-N](#)). Use your judgment in deciding which position will be clearer for the reader.

**Example 13-M • Controlling law is combined with the legal question**

**QUESTION PRESENTED**

Paul Adams made a statement to an undercover officer that implicates him in a local robbery. He made the statement after the undercover officer parked his unmarked police car behind Mr. Adams's car. When the officer asked if he was planning to leave, Mr. Adams said "no." Under Oregon law, which allows statements into evidence if the encounter is "mere conversation," will Mr. Adams's statement be admissible against him at trial?

**Example 13-N • Controlling law begins the statements-and-question format**

**QUESTION PRESENTED**

Oregon law allows a defendant's statements into evidence if it occurs during "mere conversation." Our client, Paul Adams made a statement after an undercover officer parked his unmarked police car behind Mr. Adams's car and after Mr. Adams said he was not planning to leave. Will Mr. Adams's statement be admissible against him at trial?

Whether you are using the under/does/when format or the statements-and-question format, make sure that your Question Presented contains the vital information the attorney reading it will be seeking: the exact controlling law, the precise legal question being asked, and the determinative facts on which the question will turn.

**B. Tools for Drafting an Effective Question Presented**

**1. Create one Question Presented for each main issue in the memorandum**

Each dispositive legal issue in the memorandum gets its own Question Presented (and Brief Answer). If your client's question is whether she has a valid claim for adverse possession, which is one issue, your memo would have one Question Presented (and one Brief Answer). But if your client has additional, dispositive legal issues (such as whether she can bring a claim for trespass or whether the statute of limitations has expired on her claim), then you would need to include a Question Presented (and Brief Answer) for each dispositive legal issue.

The order in which you present a series of Questions Presented should follow the order in which the legal issues are addressed in the body of the memo.

**2. Describe the facts that will be determinative to the court**

In your Question Presented, the facts are important because a court's decision is fact-specific. If the facts were to change, the court's conclusion might change. Thus, a well-drafted Question Presented must describe the facts that would be determinative to the court's conclusion.

For example, the legal issue in the Adams case in [Examples 13-A](#) and [13-B](#) is not just whether Officer Ephgrave stopped Paul Adams. More precisely, the issue is whether Officer Ephgrave stopped Paul Adams *when* Officer Ephgrave parked his car behind Mr. Adams and told Mr. Adams he would move his car if Mr. Adams wanted to leave. Include enough factual detail so that the reader can see the facts most determinative to the court.

Detailed facts are excluded from the Question Presented in only two circumstances. First, detailed facts are not necessary if the issue the memo addresses is a pure question of law. For example, if the issue is how to interpret the language of a statute, then detailed facts may not be relevant.

The second occasion when you might not include detailed facts to describe the issue is when omitting them is the practice in your law office. Some law offices do not include detailed facts in the Question Presented. Often, those law offices structure their memo so that the Statement

of Facts appears first, and the Question Presented follows. The Question Presented assumes that the reader has read and remembered the Statement of Facts. If the custom in your law office is to state the Question Presented after the Statement of Facts and exclude facts from your question presented, by all means, do that.

If, however, you have a choice, state the Question Presented first and include detailed facts in it. The Question Presented and Brief Answer are most helpful if they are at the top of your memo. That is where they are easy to see and can most effectively serve their purpose: to give a quick, easy to read summary. Buried in your memo after the Statement of Facts, the Question Presented and the answer to it will be more difficult to find.

### **3. Describe determinative facts in concrete detail**

When describing your client's determinative facts, describe them in concrete, specific detail. Your reader should see a fact with the same degree of specificity that a court would. Compare [Examples 13-O](#) and [13-P](#) to see the difference between a description that allows the reader to clearly visualize the facts and one that does not.

#### **Example 13-O • Facts described in concrete, specific detail**

##### **QUESTION PRESENTED**

Officer Ephgrave, who was working undercover, parked his unmarked car behind Mr. Adams's car. He told Mr. Adams that he would move his car when Mr. Adams wanted to leave. Mr. Adams said, "Oh, okay. No problem." During the conversation that followed, Mr. Adams made a statement that implicated him in a local robbery. Under Oregon law, will that statement be admissible at Mr. Adams's trial?

#### **Example 13-P • Facts are generalized**

##### **QUESTION PRESENTED**

Officer Ephgrave blocked Mr. Adams's car. Mr. Adams said it wasn't a problem. During the conversation that followed, Mr. Adams implicated himself in a local robbery. Under Oregon law, will that statement be admissible at trial?

The first example, [Example 13-O](#), describes the facts in concrete, specific terms. The specificity allows the reader to visualize the issue. The second example, [Example 13-P](#), generalizes the facts. Instead of describing how Officer Ephgrave blocked Mr. Adams's car, the second example simply asserts that the car was blocked. Similarly, instead of explaining Mr. Adams's exact statement to the officer, the second example paraphrases his response. In the second example, the issue remains fuzzy because the facts are fuzzy.

When drafting a Question Presented, you will have to balance the competing needs of factual specificity with concise sentences. When using the under/does/when format, your Question Presented will appear in a single sentence. Therefore, you will need to be especially careful to draft your facts to get optimum specificity without too much length. Although the Question Presented should be as complete as possible, it still needs to be clear, readable, and understandable.

### **4. Avoid legally significant phrases that assume the answer**

In stating the Question Presented, you must avoid assuming the legal conclusion. You will assume the legal conclusion by describing a legal conclusion as a fact.

For instance, in [Example 13-Q](#) the writer was asked to determine whether a person's conduct alienated the affections of another man's wife. The example assumes a legal conclusion because it asserts that "the paramour alienated the wife's affection for her husband" (shaded). Thus, rather than just giving the determinative facts of what happened, the writer assumed the answer to the ultimate question the memorandum was designed to answer.

#### **Example 13-Q • Avoid legally significant phrases**

##### **QUESTION PRESENTED**

Under South Dakota statutory law, which prohibits a third party from seducing another man's spouse, is the third party liable for alienating the wife's affections when the paramour alienated the wife's affection for her husband by sending her flowers, notes, and expensive gifts?

## **5. Avoid “whether” when introducing your Question Presented**

Traditionally, attorneys would begin a Question Presented with “whether,” as in [Example 13-R](#).

### **Example 13-R • Avoid “whether” at the beginning of your Question Presented**

#### **QUESTION PRESENTED**

Whether an individual is stopped when an officer blocks an individual’s car but tells the individual he will move the car when the individual wishes to leave.

“Whether” is stiff and makes for convoluted writing. Additionally, this format does not yield a complete sentence with a subject and a verb. Unless your office format or local custom requires it, avoid “whether” when introducing your Question Presented. Try instead to write a sentence that is grammatically correct and easier for your reader to understand.

## **6. State the question concisely**

Remember that the Question Presented is a *summary* of the legal question being addressed. An entire memo follows and will flesh out those details you want to include. As a guide, try to keep each Question Presented to 75 words or fewer.<sup>4</sup>

#### IV. Writing a Brief Answer

Every Question Presented in the memorandum should be partnered with a corresponding Brief Answer. The Brief Answer gives the reader two things: the ultimate answer to each issue in the client's legal question and the most important reasons for that answer.

The Brief Answer should be a single, concise paragraph. The first sentence of the paragraph should answer the question posed in the Question Presented, without elaboration. In the rest of the paragraph give the most important reasons that support your answer. Keep this paragraph short—include only the fundamental reasons for your answer, as in [Example 13-S](#). Remember, your reader will get a full explanation of your prediction in the Discussion section.

##### Example 13-S • Example of a Brief Answer

###### BRIEF ANSWER

Yes. Our client can likely bring a successful claim for contractual misrepresentation. Misrepresentations are material when they are likely to affect the conduct of a reasonable person in the transaction. A representation is likely to affect a person's conduct when that person is peculiarly disposed to attach importance to that particular representation. Therefore, the representation that the house was haunted can be material because it was ultimately what affected our client's decision to buy the house.

Unlike the Question Presented, the Brief Answer does not come in alternate forms. Even though the Brief Answer is straightforward, a few tools can help you write a more effective Brief Answer.

- **State the answer concisely and visibly**

Because the Brief Answer should give a quick and easy-to-absorb answer, keep your initial answer short, and place it at the top of the paragraph. Short sentences are easier to absorb, and sentences at the beginning of a paragraph are easier for the eye to pick out. A simple "Yes," "No," "Most likely, yes," or "Mr. Adams was probably not stopped" are good short answers. The rest of your answer can explain why. All together, if you want your answer to be quick and easy to absorb, it should not exceed 75 words.<sup>5</sup>

- **State the specific rule on which your answer turns**

Your answer should include the underlying legal rule that will guide the court to its conclusion. Sometimes you will have several different rules to choose from. For instance, in explaining why Mr. Adams's statement will be admissible against him, you could choose from among the following rules:

- A person is stopped if his liberty is restrained.
- To be stopped, a person must "reasonably believe that his liberty was restrained."
- A defendant is stopped if an officer blocks the defendant's car and the defendant was intending to leave.

If you have several rules to choose from, you will want to focus on the rule that best explains the principle on which the court's decision will hinge. In Mr. Adams's case, you might choose to focus on the second rule, which says "to be stopped, a person must 'reasonably believe that his liberty was restrained.'" That rule clearly articulates the principle on which the court will decide the case. Although the other two rules also communicate important concepts, the first rule is broad, and the third rule may seem curious to a reader who has not yet learned why a blocked car or an altered course is relevant.

- **State your degree of certainty**

Your goal in writing a memo is to give advice. As a result, you must take a position. That said, your memo has to be honest. It must reflect the degree of certainty that your analysis of the relevant law permits. Sometimes an outcome is certain. Often, however, you cannot say with absolute certainty that a jury will *not* find your client guilty. Or you may not be able to say that your client *will* be able to acquire title through adverse possession. You can, however, take your best guess at the likeliest outcome given the relevant law and the facts of your client's



case as you know them to be. [Table 13-T](#) suggests language you can use depending on your degree of certainty.

**Table 13-T • Degrees of certainty**

- Yes. Our client **will be able to** prove/establish ...
- Our client **will likely be able to** prove/establish ...
- Our client **will probably not be able to** prove/establish ...
- No. The company **cannot** prove/establish ...

• **Link your answer to your Question Presented**

Your reader should be able to see the connection between your Question Presented and your answer. You can create that connection by repeating language from your Question Presented in your Brief Answer.

Consider the two examples below. In the first example, 13-U, the answer is not linked to the issue. By contrast, in the next example, 13-V, the word “stop” links the answer to the issue.

**Example 13-U • Question Presented and Brief Answer are not linked**

**QUESTION PRESENTED**

Our client, Paul Adams, made a statement to an undercover officer that implicates him in a local robbery. He made the statement after the undercover officer parked his unmarked police car behind his car. When the officer asked if he was planning to leave, Mr. Adams said “no.” Under Oregon law, did Officer Ephgrave stop Mr. Adams?

**BRIEF ANSWER**

No. Mr. Adams’s liberty was not restrained. For an individual’s liberty to be restrained, the individual must reasonably believe that his liberty was being restrained. Mr. Adams could not reasonably believe that his liberty was being restrained.

**Example 13-V • Question Presented and Brief Answer are linked**

**ISSUE PRESENTED**

Our client, Paul Adams, made a statement to an undercover officer that implicates him in a local robbery. He made the statement after the undercover officer parked his unmarked police car behind his car. When the officer asked if he was planning to leave, Mr. Adams said “no.” Under Oregon law, did Officer Ephgrave **stop** Mr. Adams?

**SHORT ANSWER**

No. Officer Ephgrave did not **stop** Mr. Adams in either circumstance. An officer stops another individual if that individual could reasonably believe that his liberty was being restrained. In neither case, could Mr. Adams reasonably believe that his liberty was being restrained.

• **Answer the question asked**

Your Brief Answer should address the question asked. Sometimes, after researching a question, your extensive research and thinking about the issue can lead you down a path other than the one you were pointed to. Writing the Question Presented and Brief Answer gives you a moment to check and see whether you have, in fact, answered the question you were asked to address.



A Question Presented and Brief Answer give your reader a quick summary of the issue your memo addresses and the answer to it. Writing an effective Question Presented and Brief Answer can be challenging. Because this section will be the first part of your memo presented to the reader, spend time to draft these well.

**Practice Points**





- The Question Presented and Brief Answer open your memo. They should give the reader an immediate understanding of the legal question and your prediction of how a court will treat the issue.
- Questions Presented and Brief Answers can be styled and labeled in various forms. Choose the format your supervising attorney prefers.
- The Question Presented needs three vital parts: the controlling law and jurisdiction, the precise legal question, and the determinative facts on which the legal question will turn.
- When using the under/does/when format, draft the question in a single sentence.
- In the statements-and-question format, include two or three statements before the legal question.
- In either Question Presented format, balance clarity with completeness. Include as much of the vital information as possible, but if the section becomes too long or unwieldy, revise to make the section understandable and readable.
- Begin your Brief Answer with a short, one or two word statement that answers the question. Predict the answer with as much certainty as your analysis will allow.
- Be concise in your Brief Answer. Choose the fundamental reasons that support your prediction. You can fully explain your prediction in the Discussion section.

<sup>1</sup> We believe the originators of this format are Laurel Currie Oates, Anne Enquist, & Kelly Kunsch, *The Legal Writing Handbook: Analysis, Research, and Writing* (Aspen L. & Bus., 1st ed., 1993).

<sup>2</sup> Although we do not know who originated this format, Bryan Garner describes it in *Legal Writing in Plain English* 58-61 (U. Chi. Press 2001) (explaining how attorneys should “spill the beans” on the first page).

<sup>3</sup> The authors thank Professors Laura Graham and Luellen Curry of Wake Forest University School of Law for materials used to create [Example 13-C](#), [13-E](#) through [13-I](#), and [13-Q](#). See Section 8.2, *Applying the Law: Analogical Reasoning*, note 2.

<sup>4</sup> Garner, *supra* note 2, at 58.

<sup>5</sup> *Id.* at 61.

## Chapter 14

### **Statement of Facts**

[I. The Role of the Statement of Facts](#)

[II. Types of Facts to Include](#)

[III. Organizing Your Statement of Facts](#)

[IV. Reviewing for Thoroughness](#)

[V. Writing the Statement of Facts](#)

[VI. Examples](#)

The Statement of Facts in a legal memorandum tells your client's story as it relates to the legal question your memo addresses.<sup>1</sup> As it tells your client's story, the Statement of Facts has many jobs if your memo is to be effective. This chapter discusses the role of the Statement of Facts, the types of facts to include, how to organize your Statement of Facts, and how to review it for thoroughness.

## **I. The Role of the Statement of Facts**

Of the many jobs the Statement of Facts performs, its most important is to explain the factual foundation for your analysis of your client's legal question. The resolution of most legal questions—certainly the legal questions your clients will be asking—ultimately turn on the facts. Therefore, a clear explanation of the relevant facts is essential to supporting your analysis.

The Statement of Facts, however, performs other jobs. For example, it synthesizes the relevant facts. As an attorney, you will have to investigate and gather the facts relevant to your client's question. That investigation will include interviewing your client and reviewing relevant documents. It may also include interviewing others who are knowledgeable about the events and researching public records. Because you will be pulling facts from many different sources, the Statement of Facts provides one place to lay out the relevant, known facts in an easy-to-read manner.

The Statement of Facts also tells your reader the facts on which you based your legal analysis. It provides the reader with an opportunity to correct any factual misunderstandings or omissions that could affect the legal analysis. If additional facts come to light later, the Statement of Facts allows the reader to consider the facts that were known as of the date the memo was drafted and how the analysis might change based on the new facts. Finally, if a new attorney begins to work on the matter, the Statement of Facts provides that attorney with an overview of the facts giving rise to your prediction.

## II. Types of Facts to Include

Three kinds of facts appear in the stories lawyers tell. Those are the facts that are legally significant to your client's case, background facts, and emotional facts. But not all facts are created equally. Legally significant facts are most important to the story you tell. Background facts are necessary, but should be kept to a minimum. And emotional facts, although important to advocacy writing, are not frequently included in predictive writing.

The legally significant facts are those facts in your client's case that will affect a court's analysis. (Legally significant facts were described in [Chapter 13, Question Presented and Brief Answer](#).) Typically, legally significant facts are those that affect your prediction of the outcome. These facts are sometimes called "determinative," "key," or "critical" facts. You can think of these facts as the trigger facts in your client's case. Your Statement of Facts should be crafted so that your reader can focus on these legally significant facts.

Background facts are facts that provide context for understanding your client's situation. Although your client's story would be difficult to understand without any background facts, be careful about how many background facts you include. The more non-legally significant facts included, the more difficult it will be for your reader to determine which facts will actually affect the outcome.

Emotional facts are facts that are not necessary to resolve the legal issues but that help the reader understand what motivated the parties to act or react in a particular way. Many times, emotional facts cause the reader to feel sympathy for one party or distaste for another party. Emotional facts are appropriate in a predictive memo only if they affect your analysis or are likely to affect a court's analysis of your client's case.

In a Statement of Facts for a predictive memo, you should include every legally significant fact as well as enough background facts for your reader to understand the story you are telling. To include all the legally significant facts and sufficient background facts, you should do the following:

- **Include negative facts**

Legally significant facts include facts that are favorable to your client as well as facts that are unfavorable to your client. The primary purpose of your memo is to predict the likely resolution of the legal issues, so your reader can proceed accordingly. Only a balanced view of the facts will enable you and your reader to correctly analyze the issues and accurately predict an outcome.

- **Include unknown legally significant facts**

If, in writing your Discussion section, you determine that a fact may exist, but it is uncertain or unknown, you should indicate in your Statement of Facts that that fact is unknown. Although you should include relevant unknown facts, do not create wild conjectures about facts that could possibly exist. Generally, legally significant unknown facts are included at the end of your fact statement.

- **Include the procedural posture of the case**

"Procedural posture" refers to the steps in the litigation process. Are you trying to determine what claims or defenses to assert on behalf of a client? Have pleadings already been filed? Or are you simply trying to determine whether you should agree to represent a potential client? Explaining the point at which you are analyzing your client's claims will help your reader understand the information that was at your disposal and the purpose for your analysis. Often a sentence or two at either the beginning or end of the fact statement will provide this context.

- **Stick to the facts**

In a predictive memo, the Statement of Facts is not the place to slant the facts in favor of your client. In a predictive memo, your goal is to allow the attorneys you are working with to see the facts, warts and all.

The Statement of Facts is also not a time to draw legal conclusions or cite authority. To avoid drawing legal conclusions, avoid language that appears in your explanation of the law. For example, most of us would think that whether an establishment is a "building" is a fact that could be included in the Statement of Facts. If, however, the effect of a deed restriction turns on whether an establishment is a "building," that word becomes charged with legal meaning and should not be included in your Statement of Facts.

### III. Organizing Your Statement of Facts

Begin your Statement of Facts by providing context for your reader. “Providing context” means introducing your client (your reader will want to know whose side you are on), introducing the other parties or key players, and explaining the crux of their conflict.

When introducing the parties, it is helpful to state the parties’ names and designate their relationship. You might explain that one party is “our client,” and you might use the word “employer,” “landlord,” “neighbor,” “wife,” or “husband” to explain the relationship to the other key players.

When you state the crux of the conflict, consider describing the conflict in human rather than legal terms. For example, in a memo about adverse possession, you might begin your statement of facts by providing the context, as in [Example 14-A](#).

#### Example 14-A • Begin your statement of facts by providing context

##### STATEMENT OF FACTS

Clients introduced

Crux of the conflict is explained, and the other party is introduced.

Our clients, Linda and Tom Nero, purchased property in semi-rural Oregon in 1978. The Neros recently learned that a garden and apple orchard they had always believed to be theirs, in fact, belongs to their neighbors, Ms. Welch and Mr. Bruce. The Neros would like to claim the garden and apple orchard as their own.

Notice that in [Example 14-A](#), the conflict is described in human terms: It is a dispute about property. Although the memo later analyzes the dispute as a claim for adverse possession, the Statement of Facts avoids the legal terminology. Doing so keeps the Statement of Facts focused on the facts—and your client’s real problem.

After introducing the main actors and the conflict, you will then need to decide how to organize your story. Attorneys use three different strategies to organize their facts.

A **chronological organization** describes facts in the order in which the events occurred. Readers expect facts to be told in sequence, so a chronological organization will be easy for your reader to absorb.

A **topical organization** groups facts by issue or category. For example, you might organize your Statement of Facts around the components of a transaction. Or, you might describe first the specific conflict now at issue between the parties and then go back and describe their history. When using a topical organization, short objective headings may help your reader see your organizational plan.

A **perceptual organization** presents facts from the various participants’ vantage points. It is used primarily when the key players would tell different stories about the events at issue.

Often, attorneys use a combination of the above strategies. For example, if an attorney uses either a topical or perceptual organization, within each topic or perspective the facts will be described chronologically. Then, when the attorney moves on to the next topic or perspective, the attorney will start a new chronology.

At the end of your fact section—after setting out the relevant legal and background facts—remember to include any facts that are unknown but possibly relevant. In addition, some attorneys will describe the relief their client seeks, the specific question they have been asked to examine, or the procedural posture of their client’s case. This final paragraph then functions as a transition paragraph linking the facts to the Discussion section.

#### **IV. Reviewing for Thoroughness**

You must review your Statement of Facts after you have drafted your Discussion section. You cannot know exactly which facts will be legally significant until you have worked through the analysis of your client's question. Once you have a good working draft of your Discussion, go back, and make a list of every fact mentioned in the Discussion. Be sure to include each fact on that list in your Statement of the Facts. Your reader should never encounter a fact for the first time in your Discussion.

After you have incorporated into your Statement of Facts every fact relied on in your Discussion, you should return once more to your client's records. Search for any facts inadvertently omitted from your Discussion. After drafting your legal analysis, you will be more attuned to facts that might make a difference. Facts that initially seemed insignificant may take on new meaning. Any missing facts should be incorporated into your Statement of Facts and, of course, into your Discussion.

## V. Writing the Statement of Facts

Attorneys draft their Statements of Facts at different times. Some attorneys draft their Statement of Facts first to get a grasp of the facts before beginning their analysis or because drafting the Statement of Facts seems easier and it gets the writing juices flowing. Other attorneys draft their Statement of Facts after they have written their Discussion because writing the Discussion helps them know which facts will be relevant.

No matter when you first draft your Statement of Facts, your first draft will not be your last. As discussed above, your Statement of Facts will evolve as your analysis deepens. Below, we have provided some writing suggestions for the final revisions of your Statement of Facts.

- **Describe your client's legally significant facts in concrete detail**

As we discussed in Section 7.2, *Case Illustrations*, details signal to the reader that a fact is important. So, be specific and concrete about the facts in your client's case that will affect the outcome, and be less detailed about background facts.

- **A Statement of Facts is a story, not a list. Make it flow.**

When a Statement of Facts is viewed as a simple list of facts, it becomes difficult to follow. At one extreme, the statement will fall prey to run-on sentences in which too much information is listed at one time. At the other extreme, short, choppy sentences will mechanically deliver a list of facts.

To avoid either extreme, read your Statement of Facts out loud. Doing so will help you determine whether your Statement of Facts has succumbed to either extreme.

- **Use paragraphs to divide the facts into manageable units**

Just as you naturally pause periodically to catch your breath when you tell a story out loud, allow your reader to catch a breath by using paragraphs in your Statement of Facts.

Sometimes when writing a Statement of Facts, it can be difficult to identify where the natural breaks should go. After all, if you are describing facts chronologically, one fact occurs right after the next. Nevertheless, most chronologies describe a series of events. Consider dividing your Statement of Facts between events.

If you are still in doubt as to where the paragraph breaks should go, read your Statement of the Facts out loud. Insert a paragraph break at the spots where you find yourself naturally pausing.

- **Use status designations**

Using status designations in addition to proper names can help your reader remember the relationships among all the players in the Statement of Facts. "Employer," "employee," "husband," "wife," "landlord," and "tenant" are all status designations. Status designations will particularly help your reader remember the roles of minor players whose names may not be repeated frequently enough to be remembered.

- **Use the past tense**

Most of the time, you will be explaining events that have already occurred; therefore, use the past tense in relating your story. An exception exists if your prediction is contingent on events that have not occurred, in which case you may need to use a future or conditional tense for those particular facts.

## VI. Examples

The two examples below, [Examples 14-B](#) and [14-C](#), allow you to compare a more effective Statement of Facts and a less effective Statement of Facts. The issue addressed in the memo is whether the defendant was “stopped.” If the defendant was stopped, then any evidence gathered during the stop will be admissible only if the stop was justified by reasonable suspicion. Under Oregon law, an officer “stops” an individual if the officer blocks the individual’s car. In light of the applicable legal rule and principles of good writing, what makes one version more effective than the other?

### Example 14-B • An effective Statement of Facts

#### STATEMENT OF FACTS

On August 15, 2008, Police Officer Ephgrave spoke with Paul Adams, a suspect in a local bank robbery. During that conversation, Paul Adams revealed information that implicated him in the bank robbery.

The first paragraph provides context. It introduces the main characters and the crux of the problem.

Background facts help the reader to make sense of the story.

Earlier that day, Officer Ephgrave saw a white Ford Probe pull into a parking lot. The car looked similar to the car involved in the Davinsk Mutual Bank robbery, and Officer Ephgrave decided to investigate. At the time, Officer Ephgrave was working undercover and was wearing ordinary street clothes and driving an unmarked car.

Officer Ephgrave pulled into the parking lot and parked behind the Ford Probe. As he got out of the car, Mr. Adams yelled at the officer to move his car. Officer Ephgrave walked over to the bench where Mr. Adams was sitting and asked if he was planning to leave. According to the officer, Mr. Adams said, “no, I’m going to sit a little longer.” Officer Ephgrave pointed out that there was nowhere else to park because all the other spaces were full and told Mr. Adams he would move his car before Mr. Adams had to leave. According to Officer Ephgrave, Mr. Adams said, “Oh, okay. No problem.”

Legally significant facts—that the officer was undercover, where the Officer parked, and Mr. Adams’s reaction—are described in as much detail as possible.

Officer Ephgrave and Mr. Adams began chatting. Officer Ephgrave steered the conversation to the recent bank robbery. As they spoke, Officer Ephgrave remarked that the bank teller had said that the robber was very polite. Mr. Adams added, “Yeah, I heard he even gave a strawberry lollipop to a kid in the bank.” Officer Ephgrave knew that the media had reported that the bank robber had given a child a lollipop, but not its flavor. Officer Ephgrave then arrested Paul Adams.

Client’s admission—a very important background fact—is described precisely.

Procedural facts are included.

Mr. Adams was arraigned on August 20, 2008. He pleaded not guilty to the charges. He is now awaiting trial.

### Example 14-C • Less effective Statement of Facts

#### STATEMENT OF FACTS

Choppy sentence syndrome

Run-on sentence syndrome

On August 15, 2008, Officer Ephgrave saw a car pull into a parking lot. The car was similar to the car involved in a robbery. Officer Ephgrave pulled into the parking lot. **He blocked the car.** Mr. Adams complained. Officer Ephgrave walked over to the bench where Mr. Adams was sitting, asked if he was planning to leave, and even though Mr. Adams said he was not, Officer Ephgrave told Mr. Adams he would move his car before Mr. Adams had to leave. Mr. Adams acquiesced. They talked about the bank robbery. Officer Ephgrave recalled that the bank teller had said that the robber was very polite. Mr. Adams then made a statement about the bank robber giving a child a strawberry lollipop. Officer Ephgrave knew that the media had reported that the bank robber had given a child a lollipop, but not its flavor. Officer Ephgrave then arrested Paul Adams.

Compare the description of the client’s admission here and above. Which description would be more helpful to the senior attorney?



When you read the two Statements of Facts, you may have noticed some or all of the similarities and differences described below.

- The effective Statement of Facts, [Example 14-B](#), begins with a paragraph that gives context to the facts that follow, while the ineffective version, [Example 14-C](#), jumps into the middle of the facts.
- Both versions are organized chronologically, but the effective Statement of Facts contains background facts that provide context without overwhelming the reader with unnecessary detail. The effective Statement of Facts, therefore, does a better job of telling the story.
- The effective Statement of Facts excludes legally significant phrases. By contrast, the ineffective version includes a legally significant phrase (in bold). An officer “stops” a citizen if the officer “blocks” that citizen’s car. By using the phrases “blocked the car” the memo states a legal conclusion.
- In the effective Statement of Facts, legally significant facts are described in precise detail. By contrast, the ineffective Statement of Facts merely alludes to legally significant facts. For instance, the ineffective Statement of Facts says that “Mr. Adams acquiesced,” when what Mr. Adams said was important.
- The effective Statement of Facts consists of several shorter paragraphs that break the story into manageable segments. The ineffective version is one long paragraph.
- The effective Statement of Facts uses short and long sentences to keep the reading interesting. The ineffective version is either very choppy or falls into run-on sentences.
- The effective Statement of Facts concludes with a few sentences describing the procedural context of the memo. The ineffective version omits this information.

On balance, the first example, [Example 14-B](#), is better. Although longer, it clearly and objectively presents all the facts necessary to analyze the client’s legal question. That example also uses effective sentence structure, paragraphs, and background facts to tell the story well.

### Practice Points



- The Statement of Facts can include three types of facts: legally significant facts, background facts, and emotional facts.
- When drafting the Statement of Facts, concentrate on the legally significant facts. Add only those background facts necessary for your reader to understand your client’s story.
- Begin the Statement of Facts by providing the reader with the context of your client’s story. End the Statement of Facts with a transition sentence that flows into your Discussion section.
- Organize the Statement of Facts using a chronological, topical, or perceptual organization.

<sup>1</sup> The authors would like to thank Professor Laura Graham of Wake Forest University School of Law for providing materials helpful in drafting this chapter.

## Chapter 15

### Conclusion to the Memorandum

After you have addressed each element or factor with a full legal argument, your discussion is complete. After your Discussion section, a memo should have a new section, the Conclusion section. The Conclusion section concretely articulates your ultimate conclusion to the client's question and, if applicable, gives practical advice about what to do next.

A Conclusion section should begin by stating your bottom-line answer to your client's question. Since attorneys want to be able to find your answer quickly, state your answer to the client's question in the first line, as shown in [Example 15-A](#). Do not bury it in the middle or make your reader wait until the end of the section, as in [Example 15-B](#).

#### Example 15-A • Stronger Conclusion section states the conclusion at the outset

##### CONCLUSION

Attorney states bottom line to client's question at the beginning.

Mr. Richards has a viable claim for unjust enrichment under two different theories. First, permitting his landlord, Mr. Henry, to retain nearly \$60,000 in improvements on a \$700-per month lease would provide the landlord with an unreasonable windfall. Second, when a tenant makes improvements believing he has the right to purchase the property and is then denied that opportunity, those improvements will support a viable claim for unjust enrichment. Accordingly, Mr. Richards could file a claim seeking relief under both theories.

#### Example 15-B • Weaker Conclusion section states the bottom line at the end

##### CONCLUSION

Mr. Richards can assert two theories. First, permitting his landlord, Mr. Henry, to retain nearly \$60,000 in improvements on a \$700-per month lease would provide him with an unreasonable windfall. Moreover, in this state, a tenant may recover for improvements he makes under the reasonable belief that he has the right to purchase the property if that opportunity is then denied to him. Under both those theories, Mr. Richards has a viable claim for unjust enrichment.

Attorney waits to state bottom line to client's question.

The Conclusion section does not function like the conclusion to an academic paper. It does not re-cap the arguments presented in the paper. Rather, this section sets out only the bottom-line conclusion to your client's overarching question.

That bottom-line conclusion will be the same conclusion that you stated at the beginning of your discussion, although the words may vary. While it may include the most critical reason for your conclusion, avoid long explanations about your reasoning. If your reasoning was explained well in the Discussion section, you will not need a lengthy explanation here.

After stating your conclusion to the client's question, and perhaps the critical reason behind it, connect your conclusion to the real world: Provide the attorney reading your memo, and your client, with any practical advice you might have about any contingencies and what needs to be done next.

Remember that your client has a problem that needs to be solved. Thus, your legal analysis should always return to that real-world problem and consider how the client's problem should be managed in light of your legal analysis. Given your conclusion, what steps should the client take next? Do any other issues need to be researched? Do any more facts need to be gathered? In [Example 15-C](#), the attorney advises the client that despite a viable legal claim a mediated settlement may be preferable to litigation.

### **Example 15-C • A Conclusion section that also provides practical advice**

#### **CONCLUSION**

Attorney states bottom-line conclusion to client's question.

Attorney gives practical advice about how the client should proceed in light of the legal analysis.

The Neros have a strong claim that, under Oregon common law, they gained title to the disputed land by adverse possession. Though the Neros will likely win if they file suit, they may want to consider alternatives to filing suit, since litigation is always a gamble and usually time-consuming. Ms. Welch and Mr. Bruce may be eager to sell the disputed property at below market value rather than face litigation since a claim against the property could stall their pending construction loan. As lawyers, Ms. Welch and Mr. Bruce are likely to recognize the strength of the Neros' claim to the land. If they refuse the Neros' offer to buy the land, the Neros should first suggest mediation before filing suit.

#### **Practice Points**



- The Conclusion section should give your bottom-line answer to your client's legal question and any practical advice about what to do next.
- Do not use this final conclusion to re-cap your entire discussion.
- The Conclusion section should be succinct—typically, no more than a paragraph or two at the most.

## Chapter 16

# Editing and Polishing

### I. Edit Your Memorandum

#### A. Edit the Content of Each Legal Argument

#### B. Edit the Organization of Each Legal Argument

#### C. Edit the Discussion Section for Context and Flow

### II. Polish Your Memorandum

#### A. Strengthen Sentences

#### B. Proofread Your Work

#### C. Check Your Citations

### III. Customize Your Editing Checklist

Editing and polishing. Although they sound like tedious tasks, completing these tasks can make or break your analysis. They allow you to clarify, refine, and rework the parts of your arguments so that your intricate legal analysis is easy to understand and retain. Ultimately, effective editing and polishing distinguish the professional from the unprofessional.

Editing and polishing are separate and distinct tasks. When you edit, you check whether each argument is complete and whether the arguments are arranged logically. When you polish, you look for any snags over which your reader might trip or mistakes that might distract your reader from your words. With effective editing and polishing, the intricate patterns of your legal analysis will be woven into a tapestry that is pleasing to both the mind and the eye.

Not surprisingly, editing and polishing require time. In fact, effective writers spend more than half their time editing and polishing.<sup>1</sup> These tasks take time because they happen in rounds. You cannot reread your argument once and call it quits. Rather, you must be aware of the kinds of problems that typically arise in a legal analysis and do a separate check for each kind of problem. In addition, fixing a problem in one area might affect other areas of your analysis. So after checking for problems separately, you must still review your document as an integrated whole.

As a novice legal writer, you may not know the kinds of problems that are common in a legal analysis. The point of this chapter is to provide you with the tools to identify those problems and then to correct them in your own writing. At the end of the chapter, we provide a checklist you can use to edit your own work.

## **I. Edit Your Memorandum**

Editing—the process of reviewing the content and structure of your analysis—requires three steps. First, you must check the content of each legal argument. For each legal argument in your Discussion section you must ask yourself, “Do I have everything I need but no more?”

Second, check the organization of each legal argument. In this second step, assess whether the content of each argument is logically ordered.

Finally, edit for context and flow. Here, ask whether your reader will be able to transition easily from one legal argument to the next.

### **A. Edit the Content of Each Legal Argument**

Perhaps the most difficult decision for both novice and experienced legal writers is deciding what to include and what to exclude from each legal argument. To decide, an effective writer thinks about the information the reader needs to know. As someone new to the law, it may be difficult to imagine exactly what your reader will need to know.

New legal writers sometimes include too much information when the law is complex and they feel unsure about their analysis. Including a lot of information feels safe. They hope that if they include a lot of information, the supervising attorney can just figure out the unclear pieces.

On the other hand, new writers sometimes include too little information. They believe the law and the legal conclusions to be drawn from the law are obvious, and thus they do not need to explain the authority or the logic of how that law applies to their case. Many times, novice writers think that a longer explanation appears redundant or is tantamount to “talking down” to a more experienced, supervising attorney. So, they leave out pieces of their analysis.

Because every legal argument is different, we cannot provide you with a content checklist, but we can provide you with a way to check each argument for signs of excess and omissions. To check the content of one legal argument, (1) separate the explanation of the law from the application and then (2) compare the explanation of the law to the application for omissions and excess.

#### **1. Separate the explanation of the law from the application**

To separate the explanation of the law from the application and compare their content, you must first identify every legal argument within your discussion. Remember that a Discussion section is typically made up of one or more legal arguments. One legal argument generally includes a conclusion or issue statement at the beginning, an explanation of the law (including rules and case illustrations), an application of the law to your client’s facts, and a conclusion at the end.

To catch every argument, print out a copy of your paper. Then, use three different-colored highlighters to identify the parts of each argument. For each argument, do the following:

- In one color, highlight the conclusion or issue statement at the top and the conclusion at the bottom.
- In a second color, highlight the explanation of the law.
- In a third color, highlight the application of the law to your client’s facts.

Each section should be a distinct color.<sup>2</sup> If you cannot see three distinct sections, you need to revise.

Next, double-check to make sure that the explanation of the law has really been kept separate from your application. To do that, draw a line across your page between your explanation of the law and your application. Then, ask yourself these questions:

- Do any facts from my client’s case appear above the line? If so, review and revise.
- Do any citations appear below the line? If you are explaining new law, review and revise.

Your explanation of the law should have no facts about your client’s case. The only above-the-line reference to your client should be in the conclusion or issue statement that begins your

argument. Remember, attorneys prefer that their first look at the relevant law be stripped of any mention of a particular client. For that reason, your explanation of the law should not mention your client.

Your application usually does not need citations because your explanation of the law should cite to everything your application relies on. If you have citations below the line, ask yourself why. Some attorneys use a citation when they directly quote language from a case in their application. However, the instances when you want to cite new law in your application are limited. One instance is in a counter-analysis. As we explained in Section 8.3, *Counter-Analyses*, occasionally attorneys will cite to new law when explaining the law that supports a counter-analysis. Frequently, though, if you have citations to new law or new details about a precedential case in the application, you need to revise your explanation of the law to include those details.

After you have separated your initial explanation of the law from its application, then you can check for omissions and excess.

## **2. Compare the explanation to the application and check for omissions and excess**

The points you make in your explanation of the law should be mirrored in your application. Remember, your explanation of the law sets forth the law that is *relevant* to analyzing the client's legal question. So, if an idea is explained in your explanation of the law, that idea should be explicitly relied on or reflected in your application. Conversely, if an idea is explained in your explanation of the law but is *not* relied on or reflected in your application, then either your explanation of the law has an excess idea or your application has omitted a relevant idea.

(a) Verify that ideas explained are applied

For each idea in the explanation of the law, look in the application for language that matches, reflects, or furthers that idea. Put a check mark over each set of matching ideas. By the end, nearly all the ideas on either side of the line should have a check mark over them. If an idea is explained but not later relied on in the application, ask yourself these questions:

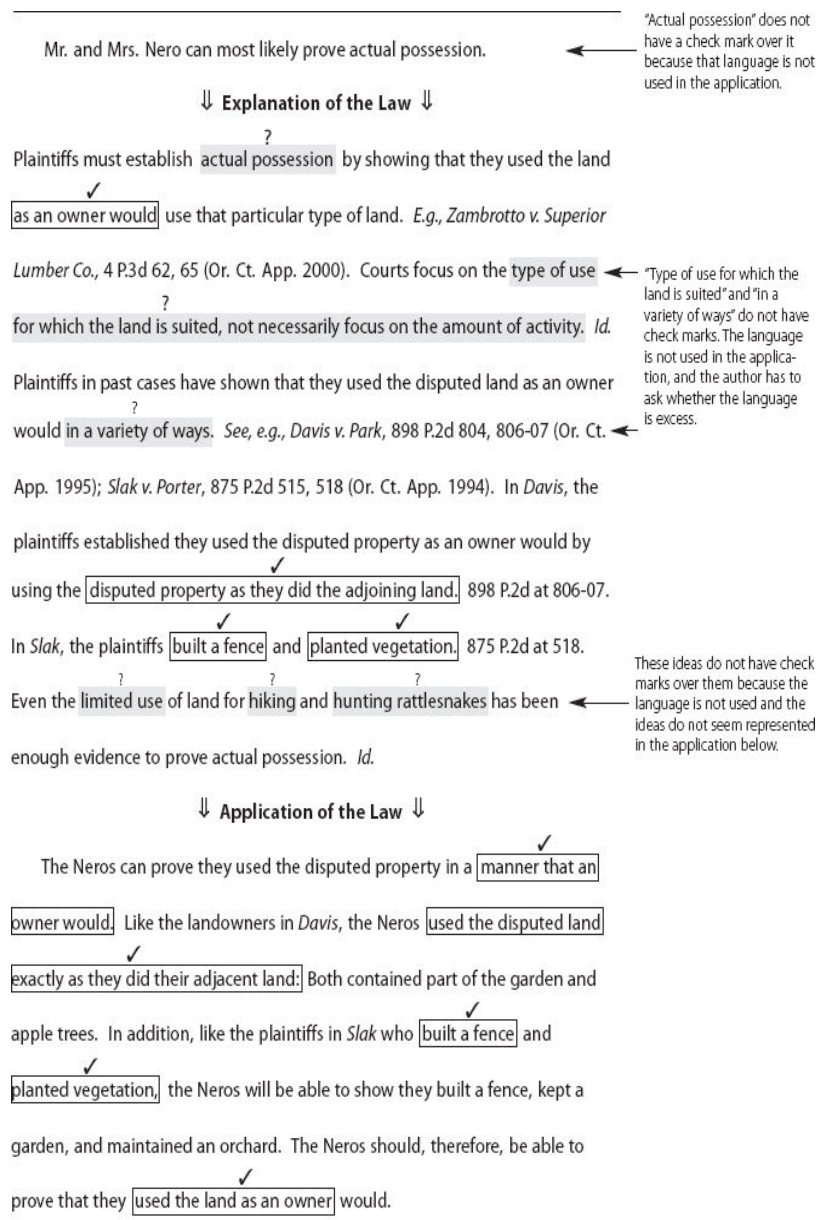
- Have I explained an aspect of the law that is not relevant to my client's question?
- Have I failed to address a relevant concept in my application?

If you have explained an aspect of the law that is not relevant to your client's legal question, usually it should be omitted. Alternatively, if you have explained relevant law but not addressed it in your application, then you will need to revise your application to address that idea.

In a few, rare instances you will explain an aspect of the law but not apply it. If the law provides necessary background information, provides context, or answers a question that is likely to be on your reader's mind, you may want to include an explanation of that aspect of the law, even though you do not directly rely on it in your application. Remember, however, that attorneys do not like to waste time. You should not include an idea just because it is "interesting." Therefore, you should rarely include an idea in your explanation of the law that is not relied on in your application.

You can see how this system works below in [Example 16-A](#). [Example 16-A](#) is a small legal argument examining whether a client can prove actual possession, one of the elements of adverse possession. You will notice that some of the ideas explained are not addressed in the application.

### **Example 16-A • Compare the explanation to the application**



After comparing the ideas that are explained to the ideas that are applied to your client's facts, you can see that several ideas were explained but not then used. For instance, the explanation of the law begins with the main idea, "actual possession." The check reveals that the writer has never mentioned "actual possession" in the application. If the writer were to ask herself whether she failed to address a key concept in her application, she should immediately answer, "Yes!" The writer inadvertently forgot to prove her main point, that the Neros can establish actual possession.

Sometimes an idea will seem interesting and applicable when you begin thinking about a client's problem, but it will not later when you apply the law. For example, the check reveals that "limited use," "hunting," and "rattlesnakes" were not relied on in the application. The author would have to ask herself, "Why?" If it no longer seems relevant to the client's problem, that idea should be omitted from the explanation.

Ideas that are subtly relied on in the application should be kept in the explanation. For example, the author explains that courts focus on "the type of use for which the land is suited." That idea is not explicitly referenced in the application. The author may, however, decide that "the type of use for which the land is suited" is reflected in the case comparisons she relies on to support her argument. In that case, the author would keep the "type of use" reference in the explanation because it is relied on, albeit subtly, in the application.



Finally, [Example 16-A](#) includes one of those rare instances when an idea is explained but not applied. The example states that plaintiffs have demonstrated their type of use “in a variety of ways,” but the phrase “variety of ways” never appears in the application. Here, she might decide that the “variety of ways” language is a helpful transition from one idea in her explanation to the next, and so although not explicitly relied on in the application, it is necessary to explaining the law cohesively. Accordingly, that idea should remain in the explanation of the law even though it is not explicitly relied on in the application.

After comparing your explanation of the law to your application, you should revise so that the two reflect each other. In [Example 16-B](#), you can see how the author might revise the text. She has revised the application to *include* “actual possession,” which is an important concept that she had initially failed to address in the application, and she has revised the explanation of the law to *exclude* the references to “limited use,” “hunting,” and “rattlesnakes” since those ideas were not relied on in the application.

### Example 16-B • Revised explanation and application

Mr. and Mrs. Nero can most likely prove actual possession.	
⇓ Explanation of the Law ⇓	
Plaintiffs can establish <u>actual possession</u> by showing that they used the	“Actual possession” is now referenced in the topic sentence and final conclusion of the application.
land <u>as an owner would</u> use that particular type of land. <i>E.g., Zambrotto v. Superior Lumber Co.</i> , 4 P.3d 62, 65 (Or. Ct. App. 2000). Courts focus on the	
<u>type of use for which the land is suited and do not necessarily focus on the amount</u>	The author decides that although “type of use” and “in a variety of ways” are not explicitly referenced in the application, their absence below is justified.
<u>of activity.</u> <i>Id.</i> Plaintiffs in past cases have shown that they used the disputed land	
as an owner would <u>in a variety of ways.</u> See, <i>e.g., Davis v. Park</i> , 898 P.2d 804,	The “limited use,” “hunting,” and “rattlesnake” ideas have been removed from the explanation of the law because they were not relied on in the application and there was no other justification for keeping them in the explanation.
806-07 (Or. Ct. App. 1995); <i>Slak v. Porter</i> , 875 P.2d 515, 518 (Or. Ct. App. 1994).	
In <i>Davis</i> , the plaintiffs established they used the disputed property as an owner	
would by using the <u>disputed property as they did the adjoining land.</u> 898 P.2d	
at 806-07. In <i>Slak</i> , the plaintiffs <u>built a fence</u> and <u>planted vegetation</u> and, in	
that way, proved actual possession. 875 P.2d at 518.	
⇓ Application of the Law ⇓	
The Neros can prove they had <u>actual possession</u> of their land because they	
<u>used the land as an owner would.</u> Like the landowners in <i>Davis</i> , the Neros	
<u>used the disputed land exactly as they did their adjacent land.</u> Both contained	
part of the garden and apple trees. In addition, like the plaintiffs in <i>Slak</i> who	
showed actual possession by <u>building a fence</u> and <u>planting vegetation</u> , the	
Neros should also be able to show actual possession because they built a fence,	
kept a garden, and maintained an orchard. The Neros should, therefore, be	
able to prove they <u>actually possessed</u> the land.	

#### (b) Remove elegant variation

After checking that the ideas expressed in the explanation of the law are relied on in the application, you should make sure that your reader can easily see that your explanation of the



law supports your application. You can do that by echoing the language of your explanation in your application.

In many forms of writing, authors are discouraged from using the same phrase over and over again. When writing about the law, however, such repetition is usually welcomed. Legal phrases are terms of art. Each has a very specific meaning. If the same idea is expressed differently, an attorney will assume you are discussing a new idea.

You can use the matching exercise shown above in [Example 16-A](#) to consider variations in words. Look for changes in language, and ask yourself whether that change will make an attorney think you are discussing a new idea. If so, change the “elegant variation” and, instead, make the terms for like ideas consistent.

Creating consistency still permits some variation. For example, an attorney will understand that “actually possessed” represents the same idea as “actual possession.” But, in [Example 16-B](#), had the author concluded that the Neros had merely “possessed” the land, the attorney would be momentarily confused and wonder whether the writer was actually referring to the same idea. Although she might ultimately decide that the writer had intended to refer to the same idea, you do not want your reader to have to pause and wonder what you mean.

(c) Check the completeness of your case illustration

The above check—comparing your explanation of the law to your application of the law—may be sufficient to ensure that you have included everything you need to, but no more. Before moving on, however, you may want to do a second, individual check of your case illustrations and their applications.

Determining whether a case illustration has enough but not too much detail is often particularly challenging for new legal writers, so a special check is often warranted. One way to check whether you have provided sufficient, but not too much, detail is to compare the facts, reasoning, and holding provided in the case illustration with the information relied on in the application.

Remember, the explanation and application should mirror each other. For example, if a fact is relied on in the application, that exact fact should be described in the explanation of the law. The same is true for the reasoning and the holding. (Of course, some facts, such as those that give context, will be explained but not relied on. Those facts, however, should be kept to a minimum so they do not distract from the more critical facts.)

Similarly, if a precedential case is heavily relied on for several points in your application, your explanation of the law will need to thoroughly cover each of those points. Conversely, if you rely on a case briefly to elucidate one minor point in your application, your case illustration can be shorter in your explanation.

By comparing your explanation of the law to your application and, in particular, by carefully comparing how you described a prior case with how you used that prior case in your application, you can assess whether an argument has everything it needs, but no more.

## **B. Edit the Organization of Each Legal Argument**

Once you have determined that an argument is complete, yet without extraneous ideas, you should then check to see whether the ideas are well organized.

An argument is well organized if its ideas are ordered logically. The catch is that your ideas must be ordered logically for the typical attorney, which may or may not be how you would instinctively order your ideas. For instance, the order in which you think through the ideas may not be the most logical order in which to present them.

You can check whether your argument is logically ordered by, again, comparing the explanation of the law to the application. Your reader assumes that your explanation of the law explains a logical way to step through a legal argument and, therefore, assumes that your explanation and application will follow the same steps in the same order.

For example, if you were to outline the argument in [Example 16-B](#), you would see that the explanation and application of the law are ordered, generally, in the same way:

- *Actual possession*
- *As an owner would*

- Courts focus on type of use, not amount of use  
*Land used as the adjoining property is used (Davis)*  
*Fence and vegetation (Slak)*

To avoid confusing your reader, check the order of your ideas in your explanation against the order of your ideas in your application. Jot down a quick outline of the ideas in your explanation of the law. Then, compare that outline to the order of ideas in your application. If the ideas in your explanation are not in the same order as in your application of the law, you will have to consider whether you need to change the order and, if so, which ordering is more effective. For recommendations about how to effectively order your explanation and application, return to Section 8.4, *Organizing Your Application*.

Once you have checked one legal argument for its content and organization, you have to repeat those checks for all the legal arguments in your memorandum.

### C. Edit the Discussion Section for Context and Flow

In a well-written legal memorandum, the reader glides through complex legal concepts. For your reader to glide through your analysis, you will need to create “context” for each new idea and “flow” between legal ideas.

“Context” refers to the ideas that your reader brings to a given passage that throw light onto its meaning.<sup>3</sup> “Flow” refers to the smooth transition from one idea to the next. Together, context and flow explain why a passage is worth reading and how ideas are connected.

To create context and flow you can use three tools: (1) roadmaps and signposts, (2) topic sentences, and (3) transitions from argument to argument. Doing so will keep your reader oriented to each point you are presenting.

#### 1. Insert roadmaps and signposts

Your reader will transition more easily from one idea to the next if she knows what to expect ahead. To help a reader see what is ahead, writers provide roadmaps and signposts.

A roadmap is any passage that indicates the organization ahead. We first discussed roadmaps and mini-roadmaps in [Chapter 12](#), *The Discussion Section: Introducing and Connecting Legal Arguments*. In that chapter, we explained that mini-roadmaps should be used when one legal idea within your discussion is broken down into more than one argument.

[Example 16-C](#) shows a mini-roadmap used in the middle of a discussion to alert the reader that a single legal idea will be addressed with more than one legal argument. That idea—whether an employee’s belief is “objectively reasonable”—will be examined in three distinct legal arguments, each of which are labeled “(1),” “(2),” and “(3).” (For more examples of mini-roadmaps, see [Chapter 12](#), [Examples 12-R](#) and [12-T](#).)

Once you have provided a roadmap, signposts will help. A “signpost” is a transition between arguments. It also reminds the reader where she is within the structure of the whole analysis. [Example 16-C](#) also includes signposts. After the roadmap identifies three factors, the “First” at the beginning of the second paragraph is a signpost that reminds the reader of where she is within that structure. Later in the memo the author will follow with signposts “Second” and “Third,” which will introduce each of those factors and, again, remind the reader where she is.

#### Example 16-C • A mini-roadmap and signpost orient the reader to the structure ahead

Substantive transition from last legal argument.

Conclusion to and beginning of the next legal argument.

Roadmap identifies 3 sub-arguments.

In addition to proving he subjectively believed he was required to participate in the company softball game, Mr. Ciesick will be able to prove that his belief that his employer expected him to play was objectively reasonable. To determine whether an employee’s belief that she was expected to engage in an off-duty activity is objectively reasonable, courts usually look for the presence of three factors: (1) the employer’s involvement in the off-duty activity, (2) the benefit to the employer from the employee’s participation in the off-duty activity, and (3) job related pressure to participate. *Meyer*, 157 Cal. App. 3d at 1041. In this case, each factor weighs in favor of proving that Mr. Ciesick’s belief was objectively reasonable.

“First” is a signpost indicating that the writer is beginning the first of the three arguments.

First, Mr. Ciesick's employer, Zoe Foods, was involved in the softball game. To determine an employer's involvement....

## 2. Check topic sentences

Topic sentences also guide your reader because they tell the reader what to expect from each paragraph. In an excellent legal argument, a reader should be able to read only the topic sentences and generally understand the argument's organizational structure and main points.

[Example 16-D](#) lists all the topic sentences in the memo about whether Paul Adams was stopped (taken from the memo provided in [Chapter 1](#), *How Attorneys Communicate*). Read through the example. Do the topic sentences allow you to see the argument's development?

### Example 16-D • Good topic sentences show an argument's development

1. Paul Adams's statement about the flavor of the lollipop will be admissible because the statement was "mere conversation" and not made during a stop.
2. Mr. Adams's statement was mere conversation rather than a stop because Mr. Adams could not reasonably believe his liberty was restrained during his encounter with Officer Ephgrave.
3. A police officer may request information without restraining a person's liberty.
4. By contrast, a person may reasonably believe his liberty has been restrained if a police officer blocks that person's car.
5. In this case, Mr. Adams's encounter with Officer Ephgrave was mere conversation rather than a stop because he could not reasonably believe his liberty was being restrained.
6. However, seeking information does not convert their conversation to a stop.
7. In fact, a court is likely to conclude that Mr. Adams's encounter with the officer to be even less restrictive than the encounter in *Gilmore*.
8. Even though Officer Ephgrave's car did block Mr. Adams's car, a court is likely to distinguish Mr. Adams's case from the *Wenger* case.

By contrast, the following example, [Example 16-E](#), shows topic sentences that do not help the reader see the argument's development.

### Example 16-E • Problematic topic sentences

1. Under Oregon law, citizens can have different kinds of encounters with police officers.
2. A person's liberty may be restrained "if an individual believes that his liberty has been restrained and that belief is objectively reasonable."
3. In *Gilmore*, an officer requested identification from three people who were sitting in a truck.
4. In *Wenger*, the defendant was intending to leave a parking lot when officers parked their car blocking the defendant's car in.
5. In this case, the encounter was mere conversation.
6. In the same *Wenger* case, the undercover officer identified himself as an officer and then later placed his hand on the defendant's shoulder and directed the defendant away to question him.
7. Because Mr. Adams was not blocked from exiting the park and because his course was not altered in such a way that he could reasonably believe his liberty was restrained, a court should find that, under the totality of the circumstances, Mr. Adams was not stopped.

For example, the first topic sentence in [Example 16-E](#) does not indicate the overall point of the argument. Additionally, the third and fourth topic sentences do not clearly establish the point each paragraph is trying to convey. Rather, the third and fourth topic sentences jump into the details of a case, and the reader cannot see the idea that those details will prove. As a result, the topic sentences in [Example 16-E](#) do less to help the reader move through the argument than the topic sentences in [Example 16-D](#).

To determine whether you have written effective topic sentences, highlight every topic sentence in your Discussion section. Then read just your topic sentences asking yourself whether they allow your reader to see the structure and main point of your argument. If not, for

each paragraph, ask yourself what is the point you want to convey in that paragraph and revise accordingly.

### 3. Check paragraph cohesion

Once you are satisfied that your argument is logically developed through your topic sentences, you need to compare the topic sentence with the paragraph's content. For each paragraph, ask yourself whether each sentence in the paragraph supports the point asserted in the topic sentence.

Sometimes you will discover just one sentence that does not support the main point of the paragraph. Other times, you will discover several sentences in the paragraph that do not support the topic sentence. If several sentences do not support the topic sentence, ask yourself what point you *really* want that paragraph to make. You may find that you really want to make a different point, and the topic sentence should be revised.

### 4. Check transitions between arguments

You will need to help your reader make the leap from one developed idea to the next, so make sure that you have good transitions. The point in your writing where you will most frequently need to create a transition is between legal arguments.

Transitions come in many forms. A "transition" is any word or phrase that indicates to the reader the relationship between two ideas. By explaining the relationship between two ideas, transitions create a bridge from one idea to the next. (Above, we discussed signposts, which are transitions keyed to an earlier roadmap.)

Transitions include the words and phrases in [Table 16-F](#). After looking at the transitions in that table, notice the effect of using transitions in [Table 16-G](#). [Table 16-G](#) also illustrates "substantive" transitions, which create a transition by identifying the key point in one idea and using that as a lead-in to the next idea.

**Table 16-F • Transitions\***

<b>Introduce</b>		<b>Restate</b>		<b>Add</b>			
First	Initially	That is	In other words	Again	Moreover		
To begin	The first reason	More simply	As noted	Additionally	Similarly		
Primarily	In general	<b>Exemplify</b>	For example	Also	Likewise		
Alternatively	A further reason			For instance			
<b>Sequence</b>		To illustrate	In particular	<b>Connect</b>	Thus		
First, second, third	Initially Then	Namely	Specifically				
Finally	Before	<b>Contrast</b>	However	As a result	Thereby		
Next	Last			But	Yet	Therefore	Hence
<b>Emphasize</b>		Unlike	In contrast	<b>Conclude</b>	As a result		
Certainly	Above all	Nevertheless	Nonetheless			Thus	Therefore
Indeed	Especially	Rather	Despite			In short	Consequently
Accordingly	Since	Instead	Still				
Not only ... but also		On the other hand					

\* Excerpted from L. Oates, A. Enquist & K. Kunsch, *The Legal Writing Handbook: Analysis, Research and Writing*, 613-22 (3d ed. 2002), and supplemented by Bryan A. Garner, *Legal Writing in Plain English: A Text with Exercises* 68 (Univ. Chi. Press 2001).

**Table 16-G • Transitions guide the reader**

Transition	Transition's Effect
<b>Next</b> , the Neros will be able to prove that their possession of the property was exclusive.	"Next" establishes a sequential relationship between the prior section and the current section.
<b>Fourth</b> , the Neros must establish that their use of the disputed property was hostile.	"Fourth" also establishes a sequential relationship and may help key the reader to a roadmap.
<b>In addition</b> to proving he subjectively believed he was required to participate in the company softball game, Mr. Ciesick will be able to prove that his belief was objectively reasonable.	"In addition" with the accompanying introductory phrase creates a substantive transition, telling your reader to expect an outcome similar to the outcome in the prior section.
Mr. Ciesick can <b>also</b> prove that his belief was objectively reasonable.	Even the word "also" can create a substantive transition. It tells your reader to expect an outcome similar to the prior outcome.
<b>Although</b> our client can prove he subjectively believed his employer required him to play in the softball game, he cannot prove that that belief was objectively reasonable.	"Although" with the accompanying introductory phrase creates another substantive transition. This transition, however, tells your reader to expect an outcome that will be different from the outcome in the prior section.

As you can see, a transition helps your reader by telling her how the parts of your argument relate to each other.

To determine whether you have created effective transitions, find the conclusion (or issue statement) at the top of each legal argument and the conclusion at the end of each legal argument. Wherever two legal arguments abut, ask yourself, "How do these arguments relate?" Then, check whether you have provided a transition that indicates that relationship.

The steps described above will help ensure that each legal argument has everything it needs, but no more; that the content of each argument is logically organized; and that your reader can see and understand the organization among those arguments. Having done that, you are ready to begin the next phase of writing: polishing your work.

## II. Polish Your Memorandum

Polishing is the final step in the writing process. When you polish, you will make sure the sentences you have written are as clear and concise as possible. Polishing includes “wordsmithing”—that is, checking to make sure each word works hard, is clear, and is accurate. Polishing also includes proofreading, checking citations, and ensuring the document is the clearest, most professional work you can give the supervising attorney.

You can think of polishing as removing the spinach from between your teeth. Although you can speak eloquently with spinach between your teeth, your audience will listen better if you remove the spinach.

### A. Strengthen Sentences

When you polish, begin by looking at each sentence. As an attorney, you are dealing with complicated ideas. Do not add to the difficulty by putting your ideas into sentences that are difficult to read.

Determining whether a sentence is difficult to read is itself difficult. After all, you wrote it. You understand what it means, and you may be too close to the sentence to recognize any problems it poses to a reader. So, instead of asking whether the sentence makes sense, look for common problems and try to eliminate those. Common problems include sentences that are overly long and sentences without clear subjects and verbs.

#### 1. Find and revise overly long sentences

Long sentences are often difficult to read. Although not all long sentences need to be revised, a long sentence is suspect. After 25 words, a reader will usually stop absorbing. Read [Example 16-H](#). At some point, you will likely stumble as you read because the ideas are too many to absorb. At what point do you stumble?

##### Example 16-H • 50 words, unreadable

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law when the court examines the factual record and makes reasonable inferences in the light most favorable to the party opposing summary judgment.

Did you stumble near the word “when”? At that point, your brain has already absorbed 28 words.

Exceptions do exist. A well-constructed sentence can exceed 25 words and still be absorbable. For instance, in [Example 16-I](#), items in a list are written in parallel form, making the sentence easy to absorb. Thus the sentence in [Example 16-I](#) is readable, despite being 52 words long. Conversely, problems can exist in relatively short sentences, that is, sentences under 25 words. So, use the techniques discussed below to address overly long sentences, but also use them to examine your shorter sentences.

##### Example 16-I • 52 words, yet readable

To determine whether an employee’s belief that he was expected to engage in an off-duty activity is objectively reasonable, courts usually look for the presence of three factors: (1) the employer’s involvement in the off-duty activity, (2) the benefit to the employer from the employee’s participation in the off-duty activity, and (3) job-related pressure to participate.

Writers use different techniques to identify suspiciously long sentences. You can choose one that works for you. One method is to highlight sentences in alternating colors. Alternating colors will allow you to distinguish one sentence from the next. If you see any blocks of color that exceed three lines, that sentence is suspect. Another method is to read your sentences aloud. Here is what will happen: You’ll be reading along slowly, and then, suddenly, you’ll start to stumble. You’ve become confused about the point of the sentence or its meaning. If you cannot read a sentence without stumbling, that sentence is suspect.

When you find a suspiciously long sentence, you should look for two typical problems. Does the sentence have too many ideas (idea-overload)? Does it use too many words to express a



single idea (wordiness)? Finding and fixing those problems will help you create shorter sentences that are easier for your reader to absorb.

(a) Revise sentences with too many ideas

Generally, one sentence should have one main idea. If a sentence has too many ideas, the sentence will become too complicated for the reader to absorb. In that case, you will need to break the sentence into separate pieces so each idea can be more easily absorbed.

Often, novice writers use commas or prepositions to attach additional ideas to a sentence. So, looking for commas and prepositions will help you identify independent ideas that might be better in their own sentence. In [Example 16-J](#), the writer has used commas to embed multiple independent ideas into one sentence. Doing so, though, creates idea-overload.

**Example 16-J • Commas embed multiple ideas and create idea overload**

The Neros, having built a fence and planted vegetation, can show constructive notice to Ms. Cramer because, having marked the purported property line with the fence and vegetation, they, like the plaintiffs in *Davis*, indicated a property line that was respected by the Neros and their neighbors.

Although some may count them differently, the sentence in [Example 16-J](#) conveys about 5 different ideas:

1. The Neros built a fence and planted vegetation.
2. The fence and vegetation marked a property line.
3. The Neros and neighbors treated that line as the property line.
4. These facts make the Neros' case like the *Davis* case.
5. Therefore, the Neros can prove constructive notice.

To address the problem, consider which of the embedded ideas can be addressed in an independent sentence. Then, test it. Put the idea into its own sentence, and re-read the sentences to see whether the two ideas are more clearly explained. It might take re-ordering the sentences or creating new transitions. In [Example 16-K](#), you can see that it took two sentences and some re-ordering to create more digestible sentences.

**Example 16-K • Embedded ideas given independent sentences**

The Neros can show constructive notice to Ms. Cramer because they built a fence and planted vegetation. Like the fence in the *Davis* case, the Neros' fence marked the purported property line that was respected by the Neros and their neighbors.

As you are testing new sentences, if you are not sure which way is better, err towards placing each idea in its own sentence. It will chunk the ideas into smaller units and make the ideas easier for your reader to absorb.

Looking for prepositions can also help you find sentences with too many ideas.<sup>5</sup> Prepositions are simply words that express a relationship between a subject and another thing. For example, a man stood *on* the train platform. "On" is the preposition. Other common prepositions are "of," "by," "for," "to," and "with."

Prepositions are necessary in your writing; however, if you have too many prepositions, you will have too many relationships for your reader to track. For that reason, you can simplify your writing by searching for prepositions and eliminating as many as possible.

[Example 16-L](#) (which you saw above as [Example 16-H](#)) has four different prepositions or prepositional phrases (and several conjunctions), all of which connect ideas.

**Example 16-L • Prepositions signal new ideas being attached**

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law when the court examines the factual record and makes reasonable inferences in the light most favorable to the party opposing summary judgment.

As we noted above, when you read the sentence in [Example 16-H](#), you likely stumble near the word “when.” At that point, you have already absorbed 28 words, but “when” indicates you need to add another idea. In a rewrite, you might see if you can eliminate the preposition “when” and thereby separate out different ideas. Is [Example 16-M](#) easier to read?

#### **Example 16-M • Preposition omitted**

Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The court will examine the factual record and make reasonable inferences in the light most favorable to the party opposing summary judgment.

##### **(b) Revise wordy sentences**

You should also examine each sentence for wordiness. Removing surplus words will make your sentences simpler in structure and easier to comprehend.

Every sentence contains both working words and glue words.<sup>6</sup> A working word carries meaning in a sentence. A glue word holds the working words together to form a sentence. While every sentence must have both, problems arise when the proportion of glue words is too high.

To determine the proportion of glue words to working words, simply highlight all the words in the sentence that carry meaning, as in [Example 16-N](#). Then, try to omit as many of the glue words as possible, as in [Example 16-O](#).

#### **Example 16-N • Glue words create bloat**

There was sufficient evidence found with respect to whether the plaintiff was “about to report” for the request for summary judgment to be denied by the court. (27 words)

#### **Example 16-O • Omit glue words to make sentence easier to read**

The court found sufficient evidence showing the plaintiff was “about to report” and, therefore, denied the request for summary judgment. (20 words)

## **2. Create clear subject-verb pairs**

Finally, your sentences will be more readable if you create clear subject-verb pairs. In every sentence, readers search (consciously or not) for who is doing what. As a result, sentences are easier to absorb if your reader can quickly identify the subject and action. Moreover, creating clear subjects paired with active verbs will make your writing jump off the page. Although the concepts you are discussing may be dry, your writing does not have to be.

##### **(a) Bring subject and verb close together**

The first step to creating a clear subject and action is to bring them close together. Compare [Example 16-P](#) with [Example 16-Q](#). Which is easier to read?

#### **Example 16-P • Subject and verb far apart**

The Neros, like the plaintiffs in *Davis* who built a fence, can establish constructive notice.

#### **Example 16-Q • Subject and verb brought together**

The Neros can establish constructive notice. Like the plaintiffs in *Davis* who built a fence,...

[Example 16-Q](#) was probably easier to read because the subject (the Neros) was close to the action it was performing (establishing constructive notice).

##### **(b) Minimize passive voice**

Minimizing passive voice will also help your reader find the subject and action in your sentence. Passive voice is a difficult concept for many. “Passive voice” refers to whether a sentence clearly states *who* is doing the action in the sentence. In a sentence with passive voice, the main actor is no longer the subject of the sentence. As a result, the reader has difficulty determining who did what. The sentence in [Example 16-R](#) illustrates passive voice. In that sentence, you are left to wonder who did the action: Who made mistakes? “Passive voice” is



different from “past tense.” “Past tense” refers to *when* certain actions took place—now or in the past. “Passive voice” refers to whether the reader knows *who* did the action.

#### **Example 16-R • Passive voice**

Mistakes were made.

[Example 16-S](#) identifies who made the mistake and is easier to read.

#### **Example 16-S • Passive voice is eliminated when the actor is identified**

John made the mistakes.

Sometimes you will want to use passive voice. Passive voice will hide an actor if you do not want to ascribe blame. Sometimes you will choose to use passive voice because you want to focus on the object rather than the subject of the sentence.

In [Example 16-T](#), the writer properly uses passive voice if he wants to focus on summary judgment, rather than on the court or judge that issued the decision.

#### **Example 16-T • Writers sometimes prefer the passive voice**

Summary judgment was improperly granted.

Typically, however, you do not need or want to hide the actor. As you read each sentence, ask yourself who is doing each action. Then, ask yourself whether your sentence will be clearer if the actor is made the subject of the sentence. You can see this process in the revisions to [Examples 16-U](#) and [16-V](#). (You saw these examples above as [Examples 16-N](#) and [16-O](#).)

Read the sentence in [Example 16-U](#) and ask yourself who “found” sufficient evidence? And who “denied” the motion for summary judgment? Asking yourself those questions might lead you to the revision in [Example 16-U](#).

#### **Example 16-U • Actor is hidden**

There was sufficient evidence found with respect to whether she was “about to report” and, therefore, the request for summary judgment was denied by the court.

#### **Example 16-V • Actor is identified and sentence is clarified**

The court found sufficient evidence showing she was “about to report” and, therefore, denied the request for summary judgment.

Notice that the sentence that hides the actor, [Example 16-U](#), includes the phrase “by the court.” The preposition “by” is often a signal that the actor has been made the object of the sentence. You can clarify the sentence by making the actor the subject of the sentence, as in [Example 16-V](#).

#### **(c) Minimize nominalizations**

Another way to create clear subjects and actions is to minimize nominalizations. A nominalization is a noun that could be expressed as a verb. For example, “supervision” is a nominalization of the verb “supervise.” Because nominalizations embed verbs within a noun, nominalizations make it difficult for your reader to find the action. Removing nominalizations will often make your sentences more active and clear.

So, if a sentence is difficult to read, scan the sentence for any words that can be converted from a noun to a verb. Look particularly for words that end in “ion” and “ment,” which are frequently nominalizations. Then, convert the noun to a verb and see whether your sentence becomes stronger using the verb. [Table 16-W](#) shows how to convert a noun to a verb.

#### **Table 16-W • Converting nouns to verbs**

Nominalization	Verbs preferred
The hearing officer was subject to the supervision, direction, and control of the Attorney General.	This hearing officer was supervised, directed, and controlled by the Attorney General.
The Neros can prove constructive notice through the establishment of property boundaries.	The Neros can prove constructive notice because they established property boundaries.
We find that there was adequate probable cause to support the trial court's issuance of the Search Warrant.	We find there was adequate probable cause for the trial court to issue the Search Warrant.

Polishing your sentence structure will tighten your writing and make it more enjoyable for your supervising attorney to read. At its best, your reader will float through the document.

## B. Proofread Your Work

Polishing also requires you to carefully re-read what you have written. You probably know that just using a computer's spell check function will not catch all proofreading errors. For example, spell check will not notice whether you have erroneously written "trail" instead of "trial" or used "statue" instead of "statute." While the spell check and grammar functions are good starting points for this task, they are no substitute for carefully re-reading what you have written.

At this point, though, you have read your paper so many times that you may find it difficult to see errors. Your mind will read what it thinks is on the page rather than what is actually there.

To help you track what is actually on the page, consider using one of the techniques attorneys often use. You can use a colored piece of paper to move line by line down through your paper. The piece of paper will cover up the words below the line you are reading and will prevent you from skipping lines. The color will provide a helpful contrast to your page.

You can also read your paper aloud. Reading your paper aloud will cause you to read more slowly and to actually look at what is written on your paper.

## C. Check Your Citations

Finally, check your citations. Citations inform your reader where to find the authorities on which you based your argument. In addition, citations indicate to the reader your level of attention to detail. If you want your reader to believe that you are an attorney who pays attention to details, then you should do a separate citation check.

Creating consistent, professional citations depends on a separate set of guidelines explained in *The Bluebook* and the *ALWD Citation Manual*. We will not repeat those rules here. We will however, give a few tips for checking your citations.

Before you begin to check your citations, your sentences must be in their final order. For that reason, checking cites is the last thing you should do.

So that you can focus on only your citations, print out a clean copy of your memorandum and highlight each citation. And, like the other processes that we discussed in this chapter, you may want to check your citations in rounds, so that you can concentrate on one task at a time.

You will want to check four things in your citations: First, make sure you are following the preferred citation format for your jurisdiction and your law office.

Then, identify the first time you cited an authority and make sure that you used a full cite. Make sure that each subsequent cite to that authority is a short cite.

Next, check that the substance of each citation is correct. Cite by cite, use *The Bluebook* or the *ALWD Citation Manual* to check whether each citation is in a proper citation form. For example, for a case, that would mean verifying the case name, volume, reporter, initial page number, and parenthetical information.

Finally, *every* citation needs a pinpoint cite unless you actually want the reader to read the entire case, article, or authority. Check that each citation has a pinpoint cite or is an *id*. Then, check each pinpoint cite to verify that it references the correct page, and check each *id*. to determine that it actually refers to the same authority and page as the citation before it.

### III. Customize Your Editing Checklist

The table ([Table 16-X](#)) below gives you a sample checklist for editing and polishing your memorandum. Use it as a starting point to ensure your work product is complete, understandable, and professional.

Ultimately, however, you must create your own checklist. Every writer struggles with different aspects of writing. Examine your writing to determine the particular problems you routinely face and create a personalized checklist.

**Table 16-X • Checklist for editing and polishing**

#### I. Edit Your Memorandum

**1. Edit the content of each legal argument: In this legal argument, do I have everything I need but no more?**

**1. Separate the explanation of the law from the application.**

1. Print out a copy of your paper.
2. Use three highlighters in different colors to highlight:
  1. The conclusion (or issue statement) at the top and the conclusion at the bottom of each argument.
  2. The explanation of the law.
  3. The application of the law.
3. Draw a line across the page to separate your explanation of the law from your application.
4. Ensure your explanation is distinct from your application.
  1. Do any facts from your client's case appear above the line? If so, revise.
  2. Do any citations appear below the line? If you are explaining new law, revise.
5. Label the top half "Explanation" and the bottom half "Application."

**2. Compare the explanation to the application to ensure each section matches in content and coverage.**

1. For each idea in the explanation of the law, look in the application for language that matches, reflects, or furthers that idea.
2. Put a check mark over each set of matching ideas.
3. For ideas without check marks, ask yourself these questions:
  1. Have I explained an aspect of the law that is not relevant to my client's question? If so, omit.
  2. Have I failed to address a relevant idea in my application? If so, revise the application by applying the relevant idea.
  3. Be very careful about ideas that are explained but not applied. Only rarely are ideas explained but not applied.
4. Check for elegant variation. Review "matches" to determine whether language is consistent.

**3. Check case illustrations.**

1. Apply step 2, above, to case illustrations.

**2. Edit the organization of each legal argument: In this legal argument, is the content logically ordered?**

1. Compare the order of ideas in your explanation of the law to the order of ideas in your application.
  1. On a separate piece of paper, jot down a quick outline of the ideas in your explanation of the law.
  2. Compare that outline to the order of ideas in your application.
  3. If ordering is inconsistent, review and revise.

**Repeat.** The above edits—Step A for content and Step B for organization—will check one legal argument. Be sure to repeat those edits for each legal argument in your discussion.

**3. Edit the Discussion section for context and flow: Is my logical order apparent to my reader?**

**1. Insert roadmaps and signposts.**

1. If a legal idea is composed of two or more arguments, consider providing a mini-roadmap.
2. For each mini-roadmap, include signposts in the discussion that follows.

**2. Check topic sentences.**

1. Highlight every topic sentence in your Discussion section.
2. Read only the topic sentences.
3. Ask whether they allow the reader to see the structure and main points of your argument.
4. If not, revise.

**3. Check paragraph cohesion.**

1. Compare each topic sentence to the sentences within the paragraph.
2. Does each sentence in the paragraph support the point asserted in the topic sentence?
3. If not, revise.

**4. Check transitions between arguments.**

1. Mark the beginning and end of each legal argument.
2. Wherever two legal arguments abut
  1. Ask yourself, "How do these arguments relate?"
  2. Check whether you have provided a transition that indicates that relationship.
  3. If not, revise.

**II. Polish Your Memorandum**

**1. Strengthen your sentences.**

**1. Find and revise long sentences.**

1. Eyeball sentence length.
  1. Using alternating colors, highlight each sentence.
  2. Note any sentences longer than 3 lines.
2. Read your paper aloud.
  1. Note any sentences that cause you to stumble.
3. Revise sentences with too many ideas.
  1. Scan for commas. If a comma embeds an idea that can be put into its own sentence, revise.
  2. Scan for prepositions. If a preposition can be omitted to simplify the sentence, revise.
4. Revise wordy sentences.
  1. Highlight every working word in a sentence.
  2. Squeeze out as many glue words as possible.

**2. Create clear subject-verb pairs.**

1. Bring subject and verb close together.
2. Minimize passive voice.
3. Minimize nominalizations.

**2. Proofread your work.**

1. Use a colored piece of paper to read line-by-line.
2. Read your paper aloud.

**3. Check your citations.**

1. Print out a clean copy of your paper.
2. Highlight each citation.
3. Verify the appropriate format for your jurisdiction and law office.
4. Check for a full cite for each legal authority the first time it is relied on.
5. Use a citation manual to check citation content.
6. Check pinpoint cites.

1. Check that each citation has a pinpoint cite.
2. Check that each pinpoint cite references the correct page.
3. Check each “*Id.*” to ensure it correctly refers to the same authority and page referenced in the cite immediately before it.

<sup>1</sup> Anne M. Enquist, *Unlocking the Secrets of Highly Successful Law Students* (2007) (available at [http://works.bepress.com/anne\\_enquist/1/](http://works.bepress.com/anne_enquist/1/)).

<sup>2</sup> The idea to use colored highlighters to separate and see different sections of a draft is from Mary Beth Beazley. See *Mary Beth Beazley, A Practical Guide to Appellate Advocacy* 92-96 (Aspen Pub. 2002). The suggestions here are a variation on that idea.

<sup>3</sup> See *Webster's Ninth New Collegiate Dictionary* 243 (Merriam-Webster Inc. 1986).

<sup>5</sup> See Bryan A. Garner, *Legal Writing in Plain English: A Text with Exercises* 41-42 (Univ. Chic. Press 2001) (recommending writers remove “of” to avoid bloat).

<sup>6</sup> Richard Wydick, *Plain English for Lawyers* 9 (4th ed. 1998).

## Chapter 17

### Client Letters

#### I. The Types of Letters Lawyers Write

#### II. The Basic Parts of a Letter

##### A. Date

##### B. Return Address

##### C. Recipient Address

##### D. Subject Line

##### E. Salutation

##### F. The Body of the Letter

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#### III. Editing and Polishing Your Letter

##### A. Create a Conversational, yet Professional Tone

##### B. Omit Legalese. Explain Legal Terms as Necessary.

##### C. Eliminate Errors

##### D. Choose a Traditional, Reader-Friendly Format

#### IV. Letters versus E-mails: Which to Send When?

After examining a client's legal problem and sharing your analysis with colleagues, you will need to communicate that analysis to your client. Sometimes you will meet with your client to communicate your analysis, and sometimes you may simply send an e-mail. Often, however, you will convey your analysis in a letter. This chapter first reviews the types of letters that attorneys frequently write. The chapter then focuses on client letters—the form of correspondence in which you will often convey an objective legal analysis. In particular, this chapter addresses how to transform the objective legal analysis you produced in memo form into an analysis appropriate for a letter to a client.

## I. The Types of Letters Lawyers Write

Attorneys write many kinds of letters. As you see in [Table 17-A](#), such letters include client letters, opinion letters, demand letters, status letters, or engagement, disengagement, or non-engagement letters. You will likely write a variety of these letters in your legal career.

**Table 17-A • Common types of letters lawyers write**

<b>Client</b>	A letter that examines a particular issue of law and the claims or legal options available to the client.
<b>Opinion</b>	A formal letter that examines a particular area of law or a legal transaction and provides a specialized opinion on the legal question.
<b>Demand</b>	A letter that demands action, or cessation of action, or the satisfaction of a legal or monetary obligation.
<b>Status</b>	A letter or report typically sent on a regularly agreed upon basis to update the client about what is happening in the litigation or transaction and what will likely happen next. This kind of letter may request input from the client on strategic choices that need to be made.
<b>Engagement</b>	A letter that establishes a working relationship and defines the scope of services, the fees, timelines, and any other details between the attorney and client.
<b>Non-Engagement</b>	A letter that declines representation of the client or handling of a legal matter after investigation or research.
<b>Disengagement</b>	A letter that terminates the working relationship between the attorney and client and provides details about how remaining work and fees should be settled.

Each of the letters listed in [Table 17-A](#) has its own purpose. For instance, if a client has consulted you about a neighbor's unauthorized storage of trailers on the client's property, a client letter would inform the client of the legal rules that apply and her options in resolving the situation. By contrast, if you are writing to the neighbor on behalf of your client, your goal would be to both inform the neighbor of the legal restrictions and to persuade the neighbor to act consistently with your client's wishes. In that case, you would be writing a demand letter. When you begin drafting a letter, you should first consider the purpose of the letter. Doing so will affect the content and tone of your correspondence. As we stated earlier, for this chapter we focus on writing client letters because that is the form of correspondence in which you will often convey an objective legal analysis.

## II. The Basic Parts of a Letter

A client letter has several distinct parts: (a) the date, (b) the return address, (c) the recipient's address, (d) the subject line, (e) the salutation, (f) the opening paragraph, (g) the body of the letter, and (h) the closing. You can see each of these parts in [Example 17-B](#).

### Example 17-B • Sample client letter

Return address

**KOENIG McCLELLAN AND TRENDOR, LLC**  
1400 SW FIFTH AVENUE, SUITE 5550  
PORTLAND, OREGON 97201

Confidentiality warning

PERSONAL & CONFIDENTIAL  
ATTORNEY-CLIENT COMMUNICATION

The date that the letter was sent

October 12, 2013

Recipient's address

Tom and Linda Nero  
8762 Barlow Road  
Boring, Oregon 97287

RE: Potential Land Dispute Claim—Client No. 097562

Dear Mr. and Mrs. Nero:

The **opening paragraph** concisely sets out the context—describing legal research conducted after a consultation; the purpose of the letter—whether the client will be successful in gaining legal title to disputed land; and the bottom-line conclusion—the client will likely gain legal title.

Thank you for consulting with me about your disputed land claim. I enjoyed meeting both of you and hearing about your property. I am pleased to tell you, based on the facts you described in our meeting, I believe you can successfully gain legal title to the land you have been farming since 1978.

I base my opinion on the following facts. If I have omitted a fact or have described a fact incorrectly, please let me know immediately.

#### **Background facts**

Notice how the discussion concisely establishes the facts as the attorney understands them and asks the reader to correct any errors or misconceptions.

- You purchased property outside of Boring, Oregon, in 1978. That property abutted a vacant lot. You believed that the western boundary of your property included an apple orchard and a strip of area where your garden now stands.
- In 1979, you began pruning the apple trees on the property and clearing a 60 × 100 square foot area along its northwest corner. There, you planted a vegetable garden and built a two-foot-high fence. Although it no longer exists, a fence existed for many years.
- You maintained the orchard and openly had a garden most years since 1979, except in 1986 and the span between 1990 through 1993. Neighbors, their children, and their grandchildren often helped you bring in the harvests in both the garden and the orchard.
- The owner of the property, Dot Cramer, has lived in Wisconsin for the past thirty years and has not visited the property. She recently sold the property to another couple, Jennifer Welch and James Bruce.
- When the new owners recently surveyed the property, the survey established that the orchard and garden belonged to Ms. Welch and Mr. Bruce.

Based on these facts, I believe you have a strong likelihood of gaining legal title to the property. As we discussed in our meeting, your claim falls under an area of property law called “adverse possession.” I understand you thought the term “adverse possession” carried a negative image of “squatters” who unfairly made land claims against legitimate property owners. Let me alleviate your concerns. Most adverse possession claims involve boundary disputes in which an owner is genuinely mistaken about a property line. In Oregon, adverse



possession claimants *must* believe that the property in dispute actually belongs to them. Because you believed the land was yours for the last thirty years, and for the reasons explained below, you have a strong likelihood of gaining legal title to the land.

Oregon law allows adverse possession claimants who mistakenly believe they own land that actually belongs to someone else to gain title if they use the land for ten consecutive years. To acquire property in this way, claimants must prove by clear and convincing evidence that their possession of the land was actual, open and notorious, exclusive, hostile, and continuous during that ten-year period.

Under the facts you have described, your use of the land meets those requirements. First, you can prove “actual” possession because you have planted a garden and maintained the orchard. You have also used the land “exclusively” since the original owner has not visited in three decades.

“Continuous” use of the land includes seasonal use, like your agricultural uses of the land during growing and harvest seasons; thus, you can prove that you have used the land “continuously.” The ten-year requirement is also satisfied since you have used the land as if it were yours since 1979.

The most challenging element will be whether your use of the land was “open and notorious.” To prove this element, we must show that the owners had notice or constructive notice of your use. Constructive notice means that the owner is legally presumed to have notice even if she does not have actual notice. In deciding whether use is open and notorious, courts often consider whether the claimant has fenced the land, which you did for many years. Also you allowed neighbors and friends to help you tend the garden and orchard. By the way you openly farmed and maintained the land, we can most likely show that the owner had constructive notice you were using the land.

#### **Options**

Here, the lawyer describes the viable courses of action available to the client.

You have three options about how to handle this property dispute with Ms. Welch and Mr. Bruce. First, you could abandon any claim you have and abide by the survey results. This option will cost you nothing, but you will be losing a piece of property that is economically and emotionally important to you. Second, you could offer to buy the portion of land from the legal owners. This option may be cost-effective. The owners may be amenable to giving you the land for a reasonable price to avoid the time and expense of defending a legal claim. This route may also contribute to a better relationship with your new neighbors. Third, you can bring a claim of adverse possession and seek title to the land. You have a good chance of succeeding on this claim, but you should also consider the costs of litigation when evaluating this option. I suggest we meet within the next two weeks to discuss which option may serve you best. If you choose to file a claim, we should not delay because most claims have a particular time limit in which they can be filed.

#### **Next steps**

This section sets out what action the client needs to take in order to determine what option may be the best course of action.

In the meantime, I would like for you to gather any evidence that we can use in your claim. You mentioned that you have numerous photographs and videotapes of the land taken through the years. Please bring those to our next meeting along with any letters, journals, or other documents describing your activities on the disputed property.

Once again, I appreciate the opportunity to help you with this matter, and I look forward to hearing from you soon.

Very truly yours,  
*Virginia Welles*

Virginia James Welles

RZM

Enclosures

#### **Closing**

These initials belong to the individual who typed the letter. These initials are usually omitted if the sender of the letter also typed the letter.

This section tells the reader that the letter will be accompanied by additional documents. Mentioning any enclosures in the body of the letter is also helpful.

Let's begin by breaking down the letter into separate parts and discussing the purpose each part serves.

### **A. Date**

Always date your letter and try to send it on that day. Not only does the date help maintain a paper trail of who did what and when, but the date also establishes a time frame for action (for example, "contact me within two weeks").

### **B. Return Address**

Your office letterhead will contain your return address and contact information. Accordingly, you do not need to provide your return address and contact information again.

### **C. Recipient Address**

Get names and addresses correct. Spelling or addressing errors detract from the power of the letter and from your credibility. Who likes to get a letter with their name spelled wrong? No one.

### **D. Subject Line**

The subject or "Re:" line should be a specific, one-phrase statement of the letter's purpose or subject (for example, "Viability of Adverse Possession Claim"). You may also include the client number and matter number your office has assigned to the case.

### **E. Salutation**

Traditional, formal greetings are most appropriate. The greeting to the recipient of a letter will be more formal than you might send in an e-mail. For example, most times you would address a letter using the recipient's title, as in "Dear Ms. Nero." If writing to someone you know personally, you could use the person's first name only (e.g., "Dear Linda"), but you would not simply write "Linda" for the salutation as you could in an e-mail.

### **F. The Body of the Letter**

The body of your letter is the critical section. The body describes the background facts upon which you relied, your analysis, the potential options you have discovered, and the next recommended steps for yourself and your client. However, before drafting any part of your analysis, you must remember to whom you are writing the letter.

A "client letter" is (obviously) going to a client; however, you must think about the particular client to whom you are sending the letter and what that client needs from the letter. Unlike an objective memo, which will be written for another attorney, your letter will be written for a client who may be a sophisticated, legally-trained general counsel of a Fortune 500 Company, an indigent client who never had the social or economic means to obtain a meaningful education, or someone in between. The more sophisticated your client, the more detailed your analysis may be. However, even the most sophisticated clients sometimes do not want detail; rather, even some very sophisticated clients simply want a bottom line so that they can move on and make decisions in their lives and businesses. Because of the wide variety of clients and their legal problems, there is no "one size fits all" approach with respect to client letters. The goal, as explained above, is to educate the client in a straightforward and understandable way about the legal issue, the client's options, and the next steps that you and the client should take.

That said, all letters, regardless of the client's sophistication, benefit from using plain English and a simple organization. Unfortunately, too many letters are lengthy, overly complicated, or too formal for common understanding; too many letters are, in a word, ineffective. Avoid creating a confused and disgruntled client by avoiding legal terms and stuffy phrasing. Keep the information provided succinct and to the point.

#### **1. Opening paragraph**

The first paragraph of the letter should establish the purpose of the letter (the legal problem or why you are writing), give any necessary context, identify any attachments to the letter, and state your bottom-line conclusion, as in [Example 17-C](#).

### Example 17-C • Example of opening paragraph

Dear Mr. and Mrs. Maclean:

I appreciate the opportunity to advise you regarding your claim. While the outcome of any litigation is uncertain, I believe you have a strong claim to recover the medical fees and property damage caused by your neighbor's dog. To ensure a complete understanding between us, below, I set out my understanding of the facts you provided to me. Following those facts, I explain the law that will govern your claim and analyze the strength of the arguments we could present on your behalf. Following that analysis, I consider various options we have to resolve the disputed dog bite.

### 2. Background facts

Always explain the background information or facts as you understand them and specifically identify any assumptions you have made. Because even a slight change of fact can change the answer to a legal question, always describe the facts upon which you base your opinions or conclusions. Include a warning that any change in facts or background could alter your opinions, and ask your client to correct any factual mistakes or erroneous assumptions.

### 3. Analysis

After explaining the relevant facts upon which your analysis is based, you will then explain your analysis. The analysis in a letter is analogous to the Discussion section in a memo; however, to accommodate your client, who is typically not a lawyer, you will make a few adjustments to your analysis to make it more accessible.

First, as in a discussion section in a memo, you will need to begin your analysis with a roadmap. [Chapter 12](#), *The Discussion Section: Introducing and Connecting Legal Arguments*, explains the typical parts of a roadmap in a memo: a conclusion, a description of the governing rule, disposal of aspects that don't require a legal argument, a roadmap and assessment of the remaining elements, a conclusion again (if necessary).

In a letter, you will likely include all of those parts except, at times, the initial conclusion. The conclusion at the beginning of the analysis may be omitted for two reasons. First, you will have already stated your conclusion in the opening paragraph. Second, because the analysis is not set off by a new section heading, re-stating your conclusion may seem a bit abrupt and interrupt the flow of the letter.

In addition, you will want to think carefully about the background information you give about the governing rule. In an objective memo, the roadmap paragraph provides a senior attorney with information about the governing rule and how the courts interpret or apply the governing rule. This information provides the senior attorney with the context necessary to understand your legal analysis. For client letters, on the other hand, a more detailed description of the legal claim should be provided to educate your client about the language you will be using to discuss the options.

Compare [Example 17-D](#), the roadmap section of a memo, with [Example 17-E](#), the roadmap section of a client letter. As you can see from [Example 17-E](#), particularly where your client is not a lawyer, you may sometimes need to provide additional information to help educate the client or explain certain terms. Other times, you may need to limit the background information you give so that you don't overwhelm your client with detail.

### Example 17-D • Roadmap section of a memo

Start with a conclusion.

Set out the governing rule and break down the elements, factors, or steps in the governing rule.

The Neros will very likely be able to gain ownership of the disputed property, including the apple orchard and vegetable garden, through adverse possession. To acquire property by adverse possession plaintiffs must prove by clear and convincing evidence that their possession of the land was actual, open and notorious, exclusive, hostile, and continuous for a ten-year period. *Hoffman v. Freeman Land and Timber, LLC*, 994 P.2d 106, 109 (Or. 1999). Oregon Revised Statute §105.620 (2007), prescribes these same elements of adverse possession, but also requires that the land be possessed through an honest belief that the plaintiffs owned the land. The statute applies only to claims that vested and are filed after January 1, 1990. *Mid-Valley Resources, Inc. v. Engelson*, 13 P.3d 118, 121 n.2 (Or. Ct. App. 2000). The Neros should

be able to prove that their claim vested by the late spring of 1989; consequently, their claim is not subject to Oregon Revised Statute §105.620, and a review of their potential claim should analyze only those activities on the disputed land that occurred from 1979 through 1989. The element that will be most difficult for the Neros to prove is that their possession was open and notorious; however, they should be able to prove that element and the other common law elements of adverse possession and, therefore, gain ownership of the disputed property.

The memo provides the legal reader with background information about a related statute that, ultimately, does not apply to the client's case. That information would be important to a senior attorney; however, because the information about the related statute is technical in nature, and ultimately does not apply to the client's situation, that information is omitted from the client letter in [Example 17-E](#).

### **Example 17-E • Analogous roadmap for a letter**

This roadmap begins with an issue statement rather than a conclusion because the writer already stated her conclusion in the opening paragraph.

As we discussed in our meeting, your claim falls under an area of property law called “adverse possession.” I understand you thought the term “adverse possession” carried a negative image of “squatters” who unfairly made land claims against legitimate property owners. Let me alleviate your concerns. Most adverse possession claims involve boundary disputes in which an owner is genuinely mistaken about a property line. In Oregon, adverse possession claimants *must* believe that the property in dispute actually belongs to them. Because you believed the land was yours for the last thirty years, you have a strong likelihood of gaining legal title to the land.

Rather than listing the elements first, the writer provides different background information to educate the client about the legal claim.

Governing rule provided here.

Oregon law allows adverse possession claimants, who mistakenly believe they own land that actually belongs to someone else, to gain title if they use the land for ten consecutive years. To acquire property in this way, claimants must prove by clear and convincing evidence that their possession of the land was actual, open and notorious, exclusive, hostile, and continuous during that ten-year period.

Note that no elements are disposed of in this roadmap.

Under the facts you have told me, your use of the land meets these requirements. First, you can prove ...

If one of the elements, factors, or steps in the roadmap to an objective memorandum is uncontroversial and therefore does not warrant a full discussion, you can dispose of the element, factor, or step and then map out and explain those that remain as the writer did in [Example 17-F](#). As you may notice in [Example 17-G](#), in a client letter, unlike a memorandum, you will not include as much detail about the legal basis for disposing of that element, factor, or step.

### **Example 17-F • A roadmap that disposes of an element in a memorandum**

Ms. Larsen will probably not be able to establish that Councilmember Bennett coerced Ms. Larsen to contribute something of value to an organization for Councilmember Bennett's benefit. Under Michigan Law, an elected official may not coerce or attempt to coerce a public employee to contribute anything of value to an organization for the benefit of the person holding elected office or for the purpose of furthering or defeating a proposed law. Mich. Comp. Laws §15.405 (2005).

In this case, Ms. Larsen is a public employee. A public employee is an “employee of the state classified civil service.” Mich. Comp. Laws §15.401. Ms. Larsen took her civil service exam in 1973 and is a Grade 14 employee, employed in the Office of the Secretary of State.

Disposing of an element that does not warrant a full legal discussion.

To determine whether Ms. Larsen was improperly coerced, this memo will consider whether (1) Ms. Larsen contributed something of value to the organization ...

### **Example 17-G • A roadmap that disposes of an element in a client letter**

Conclusion. Remember, you have an ethical obligation to deliver “bad news” when your legal research shows that your client does not have a viable legal claim.

Based on the facts as I understand them, establishing a claim against Councilmember Bennett for coercion will be quite difficult. In our meeting, we discussed that Michigan law

prohibits an elected official from coercing a public employee to contribute anything of value to an organization for the benefit of the elected official. We further discussed your concern that Councilmember Bennett improperly coerced you into holding the Secretary of State's office open an additional 15 minutes on the evening ballot measures were due and that this was a contribution of value to the organization "Save Our Downtown," as well as a contribution for the benefit of Councilmember Bennett.

Disposing of an element that does not warrant a full legal discussion. In a client letter, particularly to a non-lawyer, you will focus primarily on the client's facts rather than providing a technical description of background law that is not in controversy.

Unfortunately, my research into the matter shows that these actions are unlikely to establish that Councilmember Bennett violated Michigan Law. You are unquestionably considered a public employee since you are a Grade 14 employee in the Office of the Secretary of State. As explained below, however, it will be quite difficult for us to establish that holding the Secretary of State's office open for an additional 15 minutes was something of value or that this act was for the benefit of Councilmember Bennett.

Following a roadmap section, you will want to address each remaining element of the governing rule, just as you would in a memo. What is likely to change is the level of detail in your analysis. In a memo, you tend to rely on analogical reasoning over rule-based reasoning; by contrast, in a letter, you are likely to prefer rule-based reasoning.

As we have discussed previously in [Chapter 8.2, \*Applying the Law: Analogical Reasoning\*](#), attorneys usually prefer to argue by analogy when possible. They prefer analogical arguments because *stare decisis* is central to our legal system. *Stare decisis*, of course, requires the same outcome for cases that have the same legal issue and the same facts. Thus, if an attorney can find a case with the same facts, the same legal issue, and the desired outcome, an attorney will always argue by analogy because *stare decisis* makes the court's decision predictable.

When talking with a client, however, the factual detail required for an analogical argument may bog down your reader. Thus, you may prefer to rely more heavily on rule-based arguments. In the event that the factual similarities to a prior case are crucial to your analysis, you may still rely on an analogical argument. However, take extra care to hone the case to its essentials so that the reader is not overwhelmed by detail.

Finally, you may decide to make one other adjustment to your analysis. In a traditional memo, within a single legal argument (which examines one element, factor, or step), you always explain all the relevant law before applying the law to the client's case. That's because attorneys like to have a cohesive understanding of the law before they consider how it will apply to a client's case.

By contrast, a client simply wants to understand the likely outcome and the reasons for that outcome. Having a cohesive understanding of the legal support for the application of the governing rules to your client's facts is less important to a client. (That's why your client hired you.) You should, instead, select an organization that focuses primarily on your prediction and on applying the facts in the client's case relevant to your prediction.

Throughout, avoid citations wherever possible. In the examples above, all citations are omitted. Most readers, particularly readers who are not lawyers, do not need citations to cases or statutes. They are unlikely to look up a pinpoint cite or assess the weight of the authority you are citing. Citations often make the work look cluttered and can be distracting. If writing to a client or non-lawyer, keep citations to a minimum and focus more on rule-based reasoning and general principles.

If, however, you feel your reader needs or wants the reference, put the citation in a footnote or use an abbreviated citation. "Under the 2011 Oregon Supreme Court case of *Abraham v. T. Henry Construction*,..."

[Table 17-H](#), summarizes adjustments you might make to convert your discussion section from your memo to an analysis in a letter.

#### **Example 17-H • Converting your discussion section to an analysis in a client letter**



	Discussion Section in a Memo	Analysis in a Client Letter
<b>Roadmap</b>	Begin with an introductory roadmap section, as described in Section II.F.iii., <i>Analysis</i> .	Same, but because you have stated your conclusion in the opening paragraph, you may decide to omit an initial conclusion at the beginning of the roadmap paragraph and, instead, identify the issue.  Consider, also, what background information about the legal issue will be helpful to your client. Adjust accordingly.
<b>Organization of discussion or analysis</b>	Organize around elements, factors, or steps.	Same.
<b>Analogical v. Rule-Based Reasoning</b>	Prefer analogical arguments because of their predictive force in a legal system based on <i>stare decisis</i> .	Prefer rule-based arguments because they are less detailed and easier to absorb. When relying on analogical arguments, case illustrations should be honed to their essentials.
<b>Organization of a single legal argument</b>	For each element, factor, or step, explain all the relevant law (rules, case illustrations, and policy); then, apply that law to the facts of your client's case. Do not introduce the client when explaining the law.	For each element, factor, or step, explain the law in a manner that educates your client about the relevant rules and, to the extent necessary, explain the case illustrations that will support the strongest argument. Then apply.
<b>Citations</b>	Include after every legal proposition.	Generally omit, but if needed, use in footnotes or abbreviate the citations in the text.

To see the effect of these adjustments, review the analysis below in [Example 17-I](#). That example shows a portion of a letter to a client discussing whether the client can sue for intentional infliction of emotional distress. The excerpt below focuses on the first element of the claim, whether the client can prove extreme and outrageous conduct. After reading [Example 17-I](#), below, go to [Appendix B](#), and review the same analysis as it would be written in a memo.

#### Example 17-I • Legal analysis in a client letter

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION  
DO NOT COPY OR DISCLOSE TO ANYONE ELSE

Mr. Joseph McLaughlin  
101 South Elm Street  
Greensboro, North Carolina 27109

Re: McLaughlin v. Dixon—claim for Intentional Infliction of Emotional Distress (client no. 065001)

Dear Joe:

[*Opening paragraph and background facts omitted.*]

As we discussed in our meeting, I believe you have a strong claim for intentional infliction of emotional distress based on Ms. Dixon's alleged harassment. Intentional infliction of emotional distress is a claim that is designed to compensate a victim who is severely emotionally abused by another person. If we are successful in proving this claim, you may be able to recover costs associated with your medical bills, lost wages, and any pain and suffering you have experienced. To prove this claim, however, we would have to show (1) that Ms. Dixon engaged in "extreme and outrageous conduct," (2) that her conduct caused you severe emotional distress, and (3) that she intended to cause you severe emotional distress.

Ultimately, I believe we will be able to prove each of these elements; however, the first element—that Ms. Dixon engaged in "extreme and outrageous conduct"—will be more difficult to prove. I will thus begin by explaining that element.

To prove that Ms. Dixon engaged in extreme and outrageous conduct, we must show that her behavior was "beyond the bounds of decency" or "atrocious and utterly intolerable in a civilized society." We must show that the conduct was much more than simply insulting,

bothersome, or offensive. While these standards are somewhat nebulous, past cases have shown that conduct is extreme and outrageous if it is public, persistent, and derogatory, with no purpose for the conduct other than spite.

In this case, Ms. Dixon's harassing postings were public because they were posted on the Internet. They were also persistent because they went on for several months and continued even after you asked her to take them down. In addition, we can show that they were derogatory because she repeatedly accused you of illicit sexual misconduct, adultery, failure to pay child support, and being a "mentally unstable monster." Although Ms. Dixon may argue that her postings did have a purpose (such as protecting the public), the facts as you have described them likely show that her assertions were meritless. Thus, we will likely be able to prove that she posted her statements for no reason other than spite.

The two remaining elements will be easier to prove. To prove severe emotional distress, North Carolina law requires you to show that a medical professional diagnosed you as having a severe and disabling emotional or mental condition. Here, because your medical records from Dr. Smith show that as a result of the harassment you are now suffering from severe, chronic depression and anxieties, we can establish this element.

\* \* \*

#### **4. Options**

After explaining the analysis, discuss the available options under the law and the facts. In addition to explaining the available options, your client will likely appreciate your assessment of which options provide the best course of action.

Throughout the body of your letter, but particularly when discussing options, you will sometimes be required to deliver bad news. Beware of trying to soften bad news with a too optimistic promise or an imprudent guarantee. If you predict the options are bleak, then say so. Your client needs a wise assessment devoid of false hope. If chances are slim, but possible, be clear about the odds and the likelihood of success.

#### **5. Next steps**

Concretely state the next steps that need to be taken and clearly establish who should take those steps. Be direct and specific.

#### **Example 17-J • Example of options and next steps paragraphs**

You have two options. Since litigation is costly, we can first try to resolve the dog bite dispute directly with your neighbor. Since you have had an amicable relationship in the past, she may be amenable to reimbursing you for the medical fees and property damage her dog caused. If your neighbor does not respond favorably, we can file a claim seeking reimbursement for your damages. Please be aware that our state imposes a one-year statute of limitations on dog bite cases, meaning that your claim must be filed within one year from the date the bite occurred.

I will call you later this week to discuss these two options and how you would like to proceed. In the meantime, please send me the final hospital bill you received last month. If you have any questions or concerns, please call or e-mail me. I am hopeful that we can resolve this matter quickly and with minimal additional expense.

#### **G. Closing**

Include a closing such as "Very truly yours," or "Sincerely," and close by typing your full business name, as in [Example 17-K](#). You can vary the closing according to your relationship with the recipient (just as you did in the salutation), but keep a professional tone. If you are particularly close to the recipient or have a long-standing relationship, you may sign the letter with just your first name, as in [Example 17-L](#).

#### **Example 17-K • Example of a traditional closing for a professional letter**

Very truly yours,

*Virginia James Welles*

Virginia James Welles

**Example 17-L • Example of a closing for a professional letter when you have a more personal relationship with the recipient**

Very truly yours,

*Virginia*

Virginia James Welles

Always sign the letter, and use an electronic signature only when you cannot physically sign the letter.

**H. Confidentiality Warning**

Letters sometimes reach the wrong person, or an unwitting client might violate attorney-client privilege by sharing a letter that contains sensitive or privileged information. One of your ethical duties as a lawyer requires you to protect client confidences and to help your client protect those confidences. So, you should make it a practice to include a confidentiality warning on every letter that you send. If you have any worries that the client may inadvertently share the letter, put a specific warning in a header or footer so that it appears on every page, as in examples 17-M and 17-N. Otherwise, a general statement of confidentiality at the end of the letter should suffice. Typically, this warning would be in the form of a footer on the last page.

**Example 17-M • Example of a confidentiality warning**

This letter is a confidential attorney-client communication.  
Please do not copy, distribute, or disclose to any other person.

**Example 17-N • Example of a confidentiality warning**

PERSONAL & CONFIDENTIAL  
ATTORNEY-CLIENT COMMUNICATION  
ATTORNEY WORK PRODUCT

As with all other forms of legal writing, drafting the body of the letter is only the first step. Next, you must edit and polish.



### III. Editing and Polishing Your Letter

Editing and polishing take on heightened importance when sending a letter to a client. All readers make assumptions about your competency based on your writing. Your reader may see typographical errors and assume you are less careful and competent. Your reader may hear a condescending tone and become less accepting of your analysis.

A client is no different from other readers except for one thing: Your client has *paid* you to be competent. Thus, those errors which signal a lack of care or competence are especially frustrating to a client. Those errors communicate that the client's money has not been well spent, and those errors may undermine your client's confidence in your advice.

Thus, edit and polish your letters vigilantly. You can do that by conducting several rounds of review. In particular, review your letter's tone to ensure that it is professional and respectful. Then, edit to eliminate all errors and as much legalese as possible. Finally, review the letter's format to ensure that it appears in a traditional, reader-friendly format.

#### A. Create a Conversational, yet Professional Tone

Every piece of correspondence conveys a tone, that is, a general mood or feeling. Your tone communicates your attitude toward your work and toward your client, and your client will perceive that attitude. Tone is conveyed through word choice and sentence construction. Thus, after writing the substance of your letter, check that the tone is conversational, yet professional.

A conversational tone is one that is not too formal. Avoid complex sentences and unusual vocabulary words. In other words, keep it simple. By choosing commonly used words and simple sentence phrasing (subject before action verb, for example), your letter will be understandable and approachable.

Taking care to edit and polish your letter will convey your authority and professionalism and, at the same time, allow you to avoid the embarrassment of sending a letter like the one in Example in 18-O.

#### Example 17-O • Less effective client letter with a too colloquial tone

Dear Mr. and Mrs. Nero,

The opening paragraph does not explain the law very well. What tone do you perceive in the letter?

I hope this letter finds you in good health. Having reviewed your notes, I am happy to inform you that you stand a good chance at keeping the land under Oregon laws. We will have to file a claim for adverse possession of the property. Adverse possession allows title of the property to be granted to people who have made extensive and prolonged use of the land.

The contractions and slang give this letter a flighty air. The claim and its elements are not explained well. Notice that the attorney did not recite the facts as she understood them. Accordingly, the facts that support the elements are not clear, and mistakes in the attorney's understanding of the facts cannot be identified.

To successfully make such a claim, we need to prove openness, actual possession, exclusive possession, hostility, and continuous possession. Openness requires that the occupation of the land was publicly open—you have your “flag flying” so to speak. The fence you put up meets this part of the requirement. Actual possession means actually using the land in dispute, which has obviously been done, between the gardening, the planting, and all of the other uses you have made from the land. Hostility may sound confusing, but in layman's terms, it's the matter of intent—whether the person making the claim intended to or believed that the property was rightfully theirs. Exclusive possession is just that—and from the sounds of it, you and your family were the only people using the land. Finally, the element of continuous possession requires for the claimant to have used the land for ten or more years continuously.

This paragraph yields ambiguity. These sentences suggest that the opposition has a good claim too. How would you interpret this paragraph?

The attorney has not assessed any options or clearly indicated what next steps should be taken. The client will likely be confused as to what will happen next.

The two owners may be able to take this case to court. Although you have a pretty strong case for claiming the land, there is the possibility that the title owners will dispute the claim and move for summary judgment. Thus the question arises as to how much in the way of resources you are willing to expend to keep this part of the land. I cannot guarantee that your claim will win without a trial happening, but from the evidence I have, you will be able to win this case and keep the land.

This last paragraph is vague and does not explain what next steps either the attorney or the client will take. The open-ended time frame will likely result in the passage of time without any action on the case.

We will continue to be in touch and preparing for this case. Feel free to call us if you have any questions.

Sincerely,  
Janie  
Jane Malscrit, Esq.

Review and use the techniques discussed in [Chapter 16, \*Editing and Polishing\*](#), to help ensure your letter will be as professional and as error-free as possible.

If the content of the letter prevents you from tempering its formal tone, tell your reader you recognize that formality (as in [Example 17-P](#)). No matter the complexity of the subject, you can always use more conversational phrasing at the beginning or end of the letter to establish a more personal connection.

#### **Example 17-P • Conversational connection in a formal letter**

Dear Ms. Stone,

On behalf of Trendor McClellan Law Firm, I want to thank you for letting us assist you with the formation of your limited liability corporation. I enjoyed meeting you yesterday and getting to know more about you and your new business. I apologize for the formal tone of this letter, but I wanted to outline our understanding of the scope of representation and our firm's billing policy. Federal law requires us to provide a copy of our privacy policy, and you will find that document enclosed. As we discussed, I do not directly handle tax preparation, but I will be happy to refer you to other specialists if you need further assistance. If you have any questions about the terms of this letter, please call or e-mail me.

Listing enclosures at the beginning of a letter will not only help your administrative assistant but will also help your client in making sure they received the documents.

When using a conversational tone, however, beware of crossing into colloquial slang. Slang is the informal use of vocabulary. Slang can transform a letter from conversational to flippant. See how contractions, clichés, and too many prepositional phrases in [Example 17-Q](#) result in a colloquial, non-professional client letter.

#### **Example 17-Q • Less effective letter that uses slang, contractions, clichés, and too many prepositional phrases**

You have two options. Because litigation costs a small fortune and takes a long time, we can first try to resolve the dog bite dispute directly with your neighbor. However, since your neighbor has been a “jerk” to you over and over throughout this situation, she probably won't give you the money for your medical bills or for the property damage caused by her dog. We'll probably end up needing to file a lawsuit to seek money for your damages from this incident. Be warned, though, that our state imposes a one-year statute of limitations on dog bite cases, meaning that we need to get moving on any claim.

Although too much slang can result in an overly-colloquial tone, too much jargon can create an overly-formal tone. Jargon is the technical, specialized language of a profession or group. Using too much jargon can create a barrier with the reader who may not understand the terms. For instance, you may have a case that involves specialized scientific, medical, business, or technological terms. Unless your client is a sophisticated reader who is familiar with the industry's jargon, explain any specialized terms.

Finally, be respectful. We do not always get to choose our clients, and a time may come when you have a client who you do not like very much. When writing to such a client, never be condescending, and never express irritation or frustration in writing. Although there may be a time when you will need to have a direct conversation with a client about your working relationship, have that conversation in person or, at the very least, over the phone. Do not let those emotions slip sideways into a letter.

### **B. Omit Legalese. Explain Legal Terms as Necessary.**

Next, review your letter for legalese. Legalese, like other kinds of jargon, can create a barrier with your reader. Omit as much legal jargon as possible. Look at how the legalese in [Example](#)

[17-R](#) muddles the content and directions in the letter.

#### **Example 17-R • Letter legalese**

Dear Chaplain Cleveland,

**Enclosed please find** the documents relating to the formation and establishment of the Circle of Friends Foundation. Time is of the essence, so please **provide your signature** on the documents and return them to my office as soon as your schedule will allow. **Pursuant to** the bylaws of your diocese, we must provide a copy of the documents to Bishop John Peters within thirty days of the foundation's official formation. I have **appended** a copy of the proposed letter to Bishop Peters **herein**. Please review the letter and return it along with the **forementioned** documents. I am **cognizant of the fact that** you want to get the foundation running at **utmost haste**, and I am **at the present moment** finishing the remaining paperwork. I will alert you when the loose ends are tied.

[Example 17-R](#) shows legalese in the extreme. [Example 17-S](#) illustrates how a letter without legalese increases reader understanding and retention of the material.

#### **Example 17-S • Letter without legalese**

Dear Chaplain Cleveland,

I have attached the documents relating to the formation and establishment of the Circle of Friends Foundation. Please sign the enclosed documents and return them to my office by Friday, October 12. The bylaws of your diocese require us to provide a copy of the documents to Bishop John Peters within thirty days of the foundation's official formation. I have attached a copy of the proposed letter to Bishop Peters. Please review the letter and return it with the other documents. I know you are eager to get the foundation running, and I am finishing the remaining paperwork. I will call within the next two days when the final round of paperwork is finished.

Although you should keep legal jargon to a minimum, you need not eliminate every legal term in your writing. If your client needs to understand a legal term such as "statute of limitations" or "constructive notice," then explain the term with common words.

Essentially, get rid of the stuffiest legalese and just say things simply.

### **C. Eliminate Errors**

After checking the tone of your letter, review it again to be sure that the letter is error-free. Because of the inherent formality of a letter, mistakes or disorganization stand out. Always use the grammar and spell check functions on your computer, but remember that these aides are no substitute for careful reading. Spell check will not correct improper word choice (like "their" instead of "there" or "do reply" instead of "do not reply"). Thus, you must proofread. As discussed in [Chapter 16, \*Editing and Polishing\*](#), after spending time writing your letter, you may find it difficult to step back and see the errors. To force yourself to take a fresh look, consider one of these techniques: You can use a colored piece of paper to move line by line through your letter, you can read your letter aloud, or you can use the text-to-speech function on your computer to listen to your letter. Choose one of these techniques and read everything. An error in your client's name or address or in the "RE" line is just as embarrassing as an error in the body of your letter.

Finally, keep track of the kinds of errors you make, such as substituting "their" for "there," "it's" for "its," or "council" for "counsel" and search for those issues using the "find" function in your computer's toolbar.

### **D. Choose a Traditional, Reader-Friendly Format**

After reviewing your letter's tone, ensuring that it is written in a direct and easy-to-understand way, and eliminating all errors, you are ready to put your letter in its final format. Your firm or employer likely has a template for letters. If so, use that template. If you are not using a template, you can choose one of two traditional formats.

Within the body of the letter, paragraphs can be indented five spaces, and the date, salutation, and signature lines are indented to the center of the page. A block style, in which all

text starts at the left margin without indentations, is also popular. If you use the block style, be sure to leave a blank line between each paragraph.

When formatting, try not to crowd the information at the top of the page.

## V. Letters versus E-mails: Which to Send When?

More and more, attorneys communicate with their clients through e-mail. That fact raises the question of which mode of communication to use when.<sup>1</sup> Unfortunately, no hard and fast rule governs when to send an e-mail versus when to send a letter. To decide whether to send an e-mail or a letter, take a moment to consider some differences between letters and e-mail.

First, letters are usually considered a more formal mode of communication than e-mail. They arrive on thick bond paper, and we tend to assume that a letter takes more time and effort to prepare. Thus, letters convey a sense of importance that e-mail does not.

Second, remember that e-mails are easy to forward. As a result, when you send an e-mail, you run a greater risk that the e-mail will be forwarded to an unintended recipient.

Finally, people receive relatively few letters, but are inundated by e-mail. Thus, a letter stands out in a client's mind and is less likely to get lost in the clutter of an inbox.

These different characteristics lead to a few recommendations:

1. If you want to signal to your client that the information is important or you wish to formalize your opinion for your client, put it in a letter.<sup>2</sup>
2. If you would like the communication to become a part of your client's permanent file, send a letter.
3. If the communication contains highly sensitive or highly confidential material, and you are concerned the communication could be improperly shared, send a letter. A letter is less likely to be inadvertently forwarded.
4. If the recipient is from an older generation or less technologically sophisticated, send a letter—at least initially. You can then discuss with your client the preferred mode of communication.
5. If ever you are unsure whether to send an e-mail or letter, err on the side of formality and send a letter.

### Practice Points



- Consider what your client needs from your letter before you draft it. Is your client sophisticated or unsophisticated? Does your client simply want the bottom line or is your client interested in more detail? Draft accordingly.
- Always provide the background facts that have been communicated to you so that your client can correct any misunderstanding of the facts.
- Although the level of detail you provide in a client letter will vary depending on the client, as a general rule, prefer simpler rule-based analyses over more detailed analogical analyses.
- Always provide your client with the options that are available, advice about which options you think are preferable, and specific instructions about who should do what next and when.
- Strive for a conversational, yet professional tone.
- Use a confidentiality warning.
- Make it error-free.
- Think carefully about whether the information you want to convey is best conveyed by letter or by e-mail.

<sup>1</sup> Thank you to attorneys Margaret Kushner, Karen O'Connor, and Thom Brown for their input on using letters and e-mails in law practice.

<sup>2</sup> Comments from attorney Karen O'Connor.

## Chapter 18

### **Professional E-mails**

[I. Correspond Professionally.](#)

[II. Consider the Three Integral Parts of Correspondence: Content, Tone, and Format](#)

[A. Keep the Content Short, Clear, and Readable](#)

[B. Keep the Tone Polite and Professional](#)

[C. Keep the Style Formal](#)

[III. Stop and Think Before You Send](#)

Using e-mail is critical to practicing law effectively. As a new attorney, you will be communicating with your clients, other attorneys, and filing documents with the court electronically. As much as eighty percent of your business correspondence may be through e-mail. The benefits of e-mail are numerous: E-mail allows users to communicate ideas quickly, easily, efficiently, and without regard to schedule or geography.

As an attorney, you can take advantage of these benefits if you know how to compose a professionally-appropriate e-mail. A professionally-appropriate e-mail will (1) be easy for your reader to manage and absorb and (2) maintain the formality that is appropriate in a business setting. This chapter provides guidelines to achieve those goals.

## **I. Correspond Professionally**

E-mail has become a preferred mode of communication, and most people use it daily. With personal correspondence to friends or family, a casual style is often acceptable, and the reader will easily forgive the occasional typographical error, misspelled word, or improper punctuation. In a law practice, however, these errors take on new significance.

- **Professional e-mails should convey professionalism**

As an attorney, your credibility will be constantly evaluated with every piece of work you complete—whether that work is a complex memorandum or a three-line e-mail. In other words, the work makes a loud statement about your credibility. Sending an e-mail to a colleague or client that is too casual is like wearing a bathing suit to the office. It reflects poor judgment. In addition, your correspondence tells people how you view *them*. Correspondence that is too casual can send a message to the reader that you do not value or respect them. Most importantly, your work reflects on your employer and your client. As you draft any piece of correspondence, make sure it reflects well on you, your law office, and your client.

- **Take the same care with an e-mail that you use with a paper letter**

In every e-mail, you should evaluate the content, tone, and format. For each e-mail, take the same care as you would in a paper letter sent out over your signature. Read each e-mail before you send it. For very important e-mails, print them and read them just as you would a draft of a letter. Remember that while a paper letter may potentially be seen by a few people, e-mails can potentially be seen by millions of people around the world.

## II. Consider the Three Integral Parts of Correspondence: Content, Tone, and Format

Every piece of correspondence has three components: the substantive content you want to convey, the tone (or the voice your reader will hear when reading the correspondence), and the format (the way the correspondence looks). Because each component can either add to or detract from the reader's perception of your credibility and competency, draft your e-mail with each component in mind.

Consider the following suggestions on how to make the substance, tone, and format of your correspondence more effective.

### A. Keep the Content Short, Clear, and Readable

Your first priority in sending an e-mail is to convey information. In a law practice, attorneys communicate important substance about their client's cases in the text of e-mails. Just as with a legal memorandum, you will want that substance to be accurate and clearly explained. You will also want to keep sensitive information confidential and protect any privileges that can attach to the information.

#### • Create an appropriate and specific subject line

The subject line provides context and tells the reader what to expect. More importantly, an appropriate subject line makes it easier for your colleague to find your e-mail again. "Research re: Court's duty to determine jurisdiction" is appropriate and specific. "Research" is not.

#### • Make the e-mail and its information easy to manage and absorb

As with any other communication, you should draft e-mail with your reader in mind. Information in an e-mail must be easy for your reader to absorb, and the e-mail itself must be easy to store and then retrieve later. Make sure every word of the e-mail is necessary. Make sure every line of the e-mail clearly conveys the meaning you intend.

#### • Keep e-mails short

The optimal length for an e-mail is one screen. When a reader has to scroll through more and more screens, the information becomes more difficult to absorb. Unlike a page that ends and needs to be turned, a scrolling screen has no landmarks that allow the eye to rest or register the end of a unit. As a result, a lengthy e-mail can quickly become an overwhelming mass of information.

If your e-mail does become an overwhelming mass, your message will likely be lost. Readers tend to read thick slabs of text too quickly or skip them completely. So, your message will be easier to absorb if it is kept to one screen length.

As a result, when you want to send a legal analysis by e-mail, you will have to consider whether your complete analysis can be conveyed within approximately one screen length. If it can, you can send your analysis in the body of an e-mail. A short legal analysis appropriately conveyed in the body of an e-mail might look like [Example 18-A](#).

#### Example 18-A • A short legal analysis in an e-mail

**From:** Gail Mosse [[gmosse@zalassociates.com](mailto:gmosse@zalassociates.com)]  
**Sent:** Friday, September 5, 2013  
**To:** Dina Wong [[dwong@zalassociates.com](mailto:dwong@zalassociates.com)]  
**Subject:** Oursine Living Will

Dina –

You asked whether Tom and Kitty Oursine's living will would be enforceable in Oregon. The answer is that it will not be enforceable.

Description of the issue that the memorandum addresses and the bottom-line conclusion are stated up front.

A detailed—but short—supporting analysis is provided in the body of the e-mail.

The Oursines drafted their living will on their computer and signed it themselves without any witnesses. Under Oregon Revised Statutes §127.531 living wills "must be the same as the form set forth in this section to be valid." That section also requires that two witnesses sign the form. *Id.*



As a result, the Oursines will need to re-draft their living will. The Oursines can access the correct form at [http://egov.oregon.gov/DCBS/SHIBAadvanced\\_directives.shtml](http://egov.oregon.gov/DCBS/SHIBAadvanced_directives.shtml).

Please let me know if you have any further questions.

Gail

• **Attach complex analyses in a separate document**

When an analysis is longer than one screen, consider drafting the text in a document and attaching the document to an e-mail. Although an analysis in an attached document requires extra key-strokes to reach, an attached analysis can take advantage of the formatting features of a word processing program. Formatting, such as indented and bolded headings, paragraph breaks, and pagination all help the reader organize the information on the page. Importantly, those formatting features will be retained even when an attached document is forwarded to another person.

Moreover, a document conveys an air of formality and deliberateness. After spending the time and effort to effectively analyze a legal question, you should provide your analysis with the dignity it deserves.

• **State your bottom line up front**

Attorneys want to know the bottom line quickly. As a result, whether your analysis is short and can be included in the body of an e-mail or your analysis is long and needs to be attached, include in your e-mail a quick summary of your bottom-line. Remind your colleague or client of the issue that the e-mail is addressing and state your conclusion at the outset. Then provide any additional explanation necessary to support your conclusion.

If your analysis will fit within the body of the e-mail, your e-mail might look like the previous example, [18-A](#), or like the next example, [18-B](#).

**Example 18-B • Another short legal analysis by e-mail**

**From:** Mary Blake [[mblake@zalassociates.com](mailto:mblake@zalassociates.com)]  
**Sent:** Friday, October 24, 2013  
**To:** John Arden [[jarden@zalassociates.com](mailto:jarden@zalassociates.com)]  
**Subject:** Research re: Court's duty to determine jurisdiction  
**Attachments:** Steel v. Citizens.doc

John:

You asked that I find a case that states that a federal court must determine that it has jurisdiction over a case even if neither party raises the issue.

Description of the issue that the memorandum addresses

Quick summary of the bottom-line answer

The U.S. Supreme Court in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998), addresses the issue and states that “the first and fundamental question is that of jurisdiction.... This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.”

A copy of the case is attached, and the relevant portion is highlighted. Please let me know if you need further research regarding this issue.

Mary

If your analysis is longer and attached in a separate document, stating the bottom line might look like [Example 18-C](#).

**Example 18-C • An e-mail attaching the legal analysis in a separate memorandum**

**From:** Gail Mosse [[gmosse@zalassociates.com](mailto:gmosse@zalassociates.com)]  
**Sent:** Friday, September 5, 2013  
**To:** Dina Wong [[dwong@zalassociates.com](mailto:dwong@zalassociates.com)]  
**Subject:** Bar Application Question re: Expunged Convictions  
**Attachments:** Expunged Convictions Memo.doc

Dina –

You asked that I research whether it's permissible for our state bar to ask an applicant for information regarding convictions that were set aside or expunged under state law.

The answer is that such a question appears to be permissible. I have attached a memo discussing the relevant law and considering how an applicant might respond to the question.

If you have any additional questions, please let me know.

Gail

- **Title attached documents appropriately**

Your reader will likely need to download and save any attachment. You will make her work easier if you name the document in a way that is easy to save and find again later. For example, "Smith Affidavit.doc" is a better name than "Affidavit.doc."

- **Use the same confidentiality warning on e-mail that you would use for any legal document<sup>1</sup>**

Confidential or sensitive information about a client's case is too often distributed either to the wrong people or distributed when it should not be distributed at all. Make sure that privileged information, which includes your attorney work product, is protected. Include a confidentiality warning on each piece of e-mail you send just in case it is erroneously distributed to the wrong recipients. The best advice, though, is to stop and think before you send an e-mail, making sure its information can be communicated and that you are distributing it to the correct recipients.

## **B. Keep the Tone Polite and Professional**

Every piece of writing conveys a certain tone—that is, a general mood or feeling. As explained before, correspondence not only tells readers about your attitudes and credibility, but it also tells readers what you think about them. Your tone may convey as much information as the substance of the e-mail, so always think about the tone you would like to convey and the tone the e-mail is actually sending.

Tone is particularly tricky because readers can perceive it so differently. For instance, a sentence meant to be taken as funny, may be perceived as cruel or offensive by the reader. Be particularly aware of this component when you receive an emotionally charged e-mail or when you are tempted to send one.

Tone is most often conveyed through word choice and sentence construction. Make deliberate choices about the words you choose and about how you phrase your sentences. Your goal is to convey the substance politely and professionally.

- **Review every e-mail to consider how it will be received by the reader**

E-mail communications can be easily misinterpreted even if they are neutral because of the lack of nonverbal expressions in the message. Think about it: When you communicate in person, you rely on facial expressions, body language, and tone to express your intent. On the telephone, the pace and tone of a phone conversation provides context. Consider the e-mail exchange between two associates in [Example 18-D](#).

### **Example 18-D • Consider an e-mail's tone**

**From:** Abigail Manzanita [[amanzan@zalassociates.com](mailto:amanzan@zalassociates.com)]

**Sent:** Friday, September 5, 2013

**To:** Adam Donaldson [[adonaldso@zalassociates.com](mailto:adonaldso@zalassociates.com)]

**Subject:** Re: Smith Discovery

Sorry. Can't.

**On 9/5/13, Adam Donaldson wrote:**

Abby –

I need some help making my way through the *Smith* discovery documents. Would you have some time to help me out?

Adam

In writing the e-mail, Abigail may have assumed that Adam knows how busy she is, and she just wanted to send a reply quickly. Adam, however, may be offended that Abigail gave his request such short shrift. Before you send any e-mail, take a moment to consider how it will be received. A little more time and explanation may smooth some rough edges.

- **Determine an appropriate salutation**

Each new e-mail exchange should begin with a salutation: “Dear Bob” or “Dear Ms. Zal.” Take a moment to consider whether you know the person well enough to address that person by her first name.

A salutation, however, is not necessary once you have exchanged several e-mails about the same topic. An e-mail exchange is like a conversation, and in a conversation you do not say hello each time it is your turn to speak.

- **Do not send e-mail while emotional**

If neutral e-mails are easily misinterpreted, you can imagine how much harm can occur when you vent anger or frustration in an e-mail. Never reply emotionally, even when you get an e-mail that is emotionally charged. When you are tempted to send an emotional reply, consider:

- Would I say this to this person’s face?
- How would I feel if I received this e-mail message?

Usually, after considering the above questions you will be calm enough to write your message differently and more professionally. Consider the difference between the e-mail messages in [Table 18-E](#).

**Table 18-E • Send emotionally appropriate e-mails**

Inappropriate message	Appropriate message
If you don't get this memo done, I will report you to the managing partner TOMORROW!!!! I am sick and tired of your incompetence.	I am growing increasingly concerned about the timing of this memo. Can we set up a time to talk about this more?

While it is tempting to fire off a quick and equally nasty response to a rude e-mail, do not let someone else’s unprofessional behavior pull you down to that level. When it appears that an electronic dialogue has turned into a conflict, it is best to suggest a time to speak or meet in person.

Remember that e-mails can be forwarded to multiple recipients virtually instantaneously. A final question you might ask yourself is this:

- How would I feel if this message appeared on the front page of the *New York Times* with my name attached to it?

If you would feel comfortable with your e-mail being seen by the rest of the world, go ahead and press send.

### **C. Keep the Style Formal**

In the professional setting of a law practice, writing should be more formal. In an e-mail, use the same grammar, syntax, punctuation, writing style and, if possible, formatting that you would use in a memorandum, paper letter, or other professional document.

- **Do not type in ALL CAPS**

Writing in ALL CAPS is perceived as yelling.

- **Use proper capitalization, punctuation, and grammar**

You are not e.e. cummings. Failing to adhere to traditional writing norms will come across as flippant and unprofessional—even to members of your own office or people who know you

well.

- **Edit and spell check**

Missed details can detract from your professional image, especially if they are pervasive.

- **Do not use internet acronyms**

Although you and most of your friends may know what IMHO<sup>2</sup> or FWIW<sup>3</sup> means, a more senior colleague may not. Do not risk confusing and frustrating that colleague as she tries to figure it out.

- **Do not use emoticons**

Emoticons include smiley faces, winks, and other graphics created from type. They are typically used to convey tone; however, since you wouldn't draw a smiley face in a client letter or office memorandum, don't do it in a professional e-mail. If the e-mail text by itself does not convey the tone you are seeking, re-draft. In many cases, you should simply omit the questionable text.

- **Review the "To," "CC," and "BCC" lines**

When you receive an e-mail, be aware that the "To," "CC," and "BCC" members can change the meaning of the message as it pertains to you.

The "To" line indicates the recipient to whom the sender is speaking. "CC" stands for "carbon copy." It's a phrase that comes from the days when secretaries used typewriters and put a sheet of carbon paper between two blank pieces of paper to create copies as they typed. Today you may hear the phrase referred to as a "courtesy copy." A sender will "CC" other recipients if the sender wants the CC'd recipients to be aware of the e-mail message. Recipients in the "To" line and in the "CC" line can see that the e-mail has been sent to each other.

"BCC" stands for blind carbon copy. A sender puts a recipient in the BCC line if the sender wants the recipient to be aware of the e-mail but does not want others to know that the e-mail has been sent to that person. Recipients in the "To" and "CC" lines will not know that the e-mail has been sent to someone who is in the BCC line.

You have to be particularly careful if you receive an e-mail and you are a BCC recipient. Others will not know that you have received that e-mail, and so if you reply, you should reply only to the sender, and you should probably not refer to the e-mail publicly since the e-mail was sent to you confidentially.

You should review the "To," "CC," and "BCC" line not only when you receive the e-mail, but also before you send an e-mail. You must verify that all of the recipients are intended recipients. Make sure to know the difference between "forward," "reply," and "reply to all" and to double-check that you are striking the right key when you send an e-mail.

As an attorney, you are expected to adhere to the highest standards of discretion and confidentiality. Clearly, then, you do not want to send an e-mail with confidential matters to unintended recipients. And even if an e-mail does not happen to contain confidential information, when it is inadvertently sent to the wrong recipients the fact that you misfired your e-mail undermines confidence in your ability to be discreet and keep a confidence.

### III. Stop and Think Before You Send

Before you send, read your e-mail.<sup>4</sup> For each e-mail, take the same care that you would with any other professional document distributed over your signature. For very important e-mails, print and read them just as you would a draft of a memorandum or letter.

As you read, pause and reflect to make sure the content is accurate and supported, the tone will not be misread, the grammar and punctuation are correct, and the formatting is appropriate. In addition, before sending, determine whether the e-mail contains any sensitive or confidential information and whether that information can be disclosed to each recipient. Never send an e-mail without pausing to think about these things first.

Remember: It takes twenty years to build your reputation in a legal community, but only a minute to taint it.

#### Practice Points



- E-mail communications allow attorneys to communicate information quickly, easily, and efficiently. Because the medium is fast-paced, take extra care to maintain a proper level of formality and professionalism.
- Every e-mail should have a polite and professional tone. Use a formal style that follows traditional rules of grammar, syntax, and punctuation.
- The substance of every e-mail should be accurate, succinct, and clearly explained.
- Use the same confidentiality warning on e-mails that you would use on any legal document.
- Because every e-mail has the potential to be seen by the entire world, stop, think about it, and review the e-mail before you send.

<sup>1</sup> Wayne Schiess, *Writing for the Legal Audience* 41-43 (Carolina Acad. Press 2003).

<sup>2</sup> In my humble opinion.

<sup>3</sup> For what it's worth.

<sup>4</sup> For an expanded discussion about thinking before you send, see Schiess, *supra* note 1, at 34-36.

## Chapter 19

# The Transition from Objective to Persuasive Writing

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Until now, this book has focused on writing an objective analysis. An objective analysis assists your client in assessing a legal problem and considering options that exist on both sides of the dispute. While sometimes your client may have non-litigation alternatives to pursue, at other times, your client may decide that the best option is to file suit. If so, your objective analysis may, at some point, be transformed into a persuasive argument for a court. This chapter will explain how to transform that objective analysis into a persuasive one.

## **I. Objective versus Persuasive Writing**

At the outset, we want to emphasize one point: Persuasive writing is not so very different from objective writing. To be effective, writing—whether persuasive or objective—must be supported by the law and facts, well organized, clearly written, and free from grammatical, typographical, and other errors. Thus, all the skills you have learned so far will be applied to writing a persuasive argument.

That said, you should be aware of the following differences as you transform your objective analysis into a persuasive analysis. First, your perspective will change. Second, your audience will change. And, finally, the format in which you present your argument will change.

### **A. A New Perspective**

In writing an objective analysis, your goal is to present a neutral assessment of how a court will likely interpret and apply the law to your client's facts. You highlight the strengths and weaknesses of arguments on either side. And, importantly, in reaching a conclusion, you predict the most likely outcome, even if that outcome is not what your client may want.

By contrast, when writing a persuasive analysis, you become an advocate for your client's desired outcome. Although you cannot lose sight of the weaknesses in your client's position, you will approach those weaknesses differently. Rather than highlighting the weaknesses so that your colleagues and client can fully appreciate those weaknesses, your goal as an advocate is to explain why, despite those weaknesses, your client's desired outcome should still prevail. Acknowledging weaknesses, yet explaining why those weaknesses do not undermine your client's desired outcome, is perhaps the most difficult aspect of writing a persuasive argument. Thus, in section III.D, *Addressing Weaknesses from Your Client's Perspective*, we examine in more detail how to accomplish that end.

### **B. A New Audience**

In addition to taking on a new perspective, you will also be taking on a new audience. When writing as an advocate, your most important audience will be the court, which includes the judge and any staff attorneys or law clerks working on your case. Your goal is to convince the court to take an action that your client desires. You will be more likely to convince the court if your writing accounts for the wants and needs of this new audience. For example, when writing to a judicial audience, remember that judges want to do the right thing. Your job as an advocate is to make it easy for them to do that. Thus, you want to explain why your client's desired outcome is a correct and just outcome. Providing credible, clear arguments that are well researched and supported by the law will help you to achieve those goals. Ideally, you will write your brief in such a logical and reasonable way that a judge (if he or she wanted to) could copy and paste your argument right into a final opinion.

Finally, remember that judges and their staff are busy, overworked people. Federal appellate court judges, for example, read approximately 13,000 pages<sup>1</sup> of briefs each year—and that staggering number does not include the pages of records, trial transcripts, and background materials for each case. Because your reader is so busy, you must make your brief concise. Include only the most important arguments and avoid presenting every possible argument.

### **C. A New Format**

Writing to a court<sup>2</sup> also requires a new format. That format is usually dictated, at least in part, by court rules and the conventions of that jurisdiction. Court rules may prescribe, among other things, the length, font, margins, citation style, and sections to be included in the brief. The rules will vary from court to court, jurisdiction to jurisdiction, and may change over time. Thus, before beginning to write a document that is to be submitted to a court, check that specific court's rules. Court rules are almost always available on a court's website. Failure to follow the rules—even just failing to use the required font—could result in the case being dismissed.

## II. The Parts of a Trial Brief: An Overview

To transition from an objective to persuasive analysis, it helps to know what a persuasive analysis will look like once it is presented to a court. To that end, [Example 19-B](#) shows you what a typical trial brief looks like.

[Example 19-B](#) takes the objective analysis that you saw in memo form in [Example 1-A](#) ([Chapter 1](#)) and transforms it into a persuasive argument in a trial brief. You may remember that the memorandum in [Example 1-A](#) addresses whether a statement a defendant made to an undercover police officer was “mere conversation” and thus admissible at trial.

As you read [Example 19-B](#), begin to familiarize yourself with the typical parts of a trial brief. Those parts are (1) a caption, (2) an introduction, (3) a statement of facts, (4) an argument, and (5) a conclusion. We will discuss each of these parts in more detail in Section III, *The Argument: Presenting the Argument from Your Client’s Perspective*, and Section IV, *The Remaining Parts of the Trial Brief*, of this Chapter.

Notice also the similarities between an objective memo and a persuasive brief. Each part of an objective memo has an analogous counter-part in a trial brief, as explained in [Table 19-A](#).

**Table 19-A • Parts of an objective memo compared to analogous parts of a trial brief**

Sections in an Objective Memo	Sections in a Trial Brief	Purpose
Caption	Caption	Identifies the document
Question Presented & Brief Answer	Introduction	Provides context and focuses the reader on the issues to be addressed
Statement of Facts	Statement of Facts	Describes all the facts relevant to the analysis
Discussion	Argument	Analyzes the legal questions
Conclusion	Conclusion	Concludes the legal analysis

In addition, and perhaps most importantly, notice that individual legal arguments are still presented in the same way. That is, the writer states his conclusion, explains the law that will support that conclusion, applies the law to the client’s problem, and then concludes. In other words, a persuasive argument contains all the basic parts explained first in Chapter Six, *One Legal Argument*, and then more thoroughly in Chapter Seven, *Explaining the Law*; Chapter Eight, *Applying the Law*; and Chapter Nine, *Conclusions to One Legal Argument*. [Example 19-B](#) identifies each of the basic parts of a legal argument so that you can see that a persuasive legal argument has all the same parts as an objective legal argument.

The most significant difference between an analysis in an objective memo and an analysis in a persuasive trial brief is the perspective from which the analysis is presented. No longer does it merely predict the likely outcome of the issue. A persuasive analysis urges the judicial reader to accept the advocate’s assertion as the most legally sound and just path to follow.

### A Motion v. A Trial Brief

A “motion” is a request to a court to do something. A “trial brief,” sometimes called a “trial memorandum” or a “memorandum of law,” is a legal analysis that explains why the court should grant (or deny) the motion.

Not all motions require an accompanying trial brief. For example, a motion asking the court to reschedule a hearing would simply explain the conflict and request the change. There would be no need to provide the court with a legal analysis justifying a scheduling change.

Other motions must be submitted with an accompanying trial brief that explains the legal justification for granting the motion. A motion to dismiss, a motion for summary judgment, a motion to exclude evidence, and a motion to overturn a jury verdict are all motions that would need to be accompanied with a supporting trial brief.

When a motion needs to be supported by a legal analysis, the moving party will often submit two separate documents—a motion and an accompanying trial brief in support of that motion. In some jurisdictions, however, these two functions are merged into one document.

If the responding party opposes the motion and that opposition requires legal analysis, the responding party would submit a trial memorandum in opposition to the motion.

### Example 19-B • Example of a brief in support of a motion



The **caption** states the court in which the case is being heard, lists the parties, provides the docket number, and states the title of the document.

IN THE STATE OF OREGON FOR  
LANE COUNTY CIRCUIT COURT

State of Oregon,  
Plaintiff,  
  
v.  
  
Paul R. Adams,  
Defendant.

No. 14-285 CR

RESPONSE TO  
DEFENDANT'S MOTION  
TO EXCLUDE EVIDENCE  
FROM TRIAL

The **introduction** provides the relevant procedural history leading up to the motion before the court and identifies the legal issue to be addressed.

Depending on the jurisdiction this preliminary section may include other information or be called by a different name, such as "Preliminary Statement," "Summary" or "Statement of the Nature of the Matter Before the Court." Be sure to check your local rules and confer with colleagues about the customs in your jurisdiction.

### INTRODUCTION

Defendant Paul Adams's statement to an undercover police officer should be admitted into evidence at his trial for bank robbery. The State of Oregon filed charges against Adams for an alleged bank robbery on August 15, 2012. Adams was arraigned on August 20, 2012. He has pleaded not guilty, and the trial is set for September 16, 2012. Shortly after the robbery, Adams spoke to an undercover police officer. That statement implicated him in the robbery. Defendant Adams now moves to suppress that statement. Oregon law, however, allows a defendant's statement to be admitted into evidence where, as here, the statement was made during "mere conversation" with a police officer. Because Adams's statement was made during a conversation and not during a police stop, his statement should be admitted into evidence.

The **statement of facts** tells your client's story as it relates to the motion before the court. Like an objective statement of facts, it provides all the relevant facts—both positive and negative. In a persuasive brief, however, the writer will emphasize the positive facts and attempt to neutralize bad facts by providing a positive context.

### STATEMENT OF FACTS

On August 15, 2012, police officer Ephgrave spoke with Adams. During their conversation, Adams revealed incriminating evidence that implicated him in a bank robbery, and Adams now wants that evidence to be suppressed.

Earlier that day, Officer Ephgrave saw a white Ford Probe pull into a parking lot. The car looked similar to the car involved in a bank robbery at Davis Mutual Bank earlier that day, so Officer Ephgrave decided to investigate. At the time, Officer Ephgrave was working undercover. He was therefore wearing ordinary street clothes and driving an unmarked car.

Officer Ephgrave pulled into the parking lot and parked behind the Ford. As he got out of the car, Adams yelled at Officer Ephgrave to move his car. He walked over to the bench where Adams was seated and asked if he planned to leave. According to Officer Ephgrave, Adams said, "No, I'm going to sit a little longer." Officer Ephgrave pointed out that there was nowhere else in the lot to park his car because every other space was full and offered to move his car when Adams was ready to leave. According to the officer, Adams said, "Oh, okay. No problem."

Adams and Officer Ephgrave began chatting. Officer Ephgrave steered the conversation to the bank robbery earlier that day and remarked that the bank teller had said the robber was very polite. Adams added, "Yeah, I heard he even gave a strawberry lollipop to a kid in the bank." Officer Ephgrave knew that the media had reported the bank robber having given a child a lollipop, but had not reported its flavor. As a result, Officer Ephgrave arrested Adams.

Adams was arraigned on August 20, 2012. He pleaded not guilty and now awaits trial.

**Point headings** in a trial brief function much like they do in an objective memo: They signify the beginning and end of a section, and they assert the conclusion to the analysis in that section.

### ARGUMENT

#### I. THE DEFENDANT'S STATEMENT IS ADMISSIBLE EVIDENCE BECAUSE THE STATEMENT WAS "MERE CONVERSATION."

This short trial brief has just one legal argument. Notice that this one legal argument has the same structure as any other legal argument. The writer states the **conclusion** to his analysis, then **explains the law**, then **applies the law**, and finally restates his **conclusion**.

The defendant's motion to exclude evidence of his statement should be denied because his statement is admissible as "mere conversation." Under Oregon law, citizens can have differing encounters with police officers. *State v. Warner*, 585 P.2d 681, 689 (Or. 1991). Where an encounter is "mere conversation," evidence acquired by an officer during the encounter is admissible against the defendant. *State v. Shelton*, 796 P.2d 390, 302 (Or. Ct. App. 1990).

As in an objective memo, the **explanation of the law** begins immediately after the conclusion. In a persuasive argument, however, an attorney is likely to frame the explanation of the law so that it most effectively supports the outcome the client seeks. Here, the writer emphasizes the idea of conversation being a "mere encounter" by describing that idea first. In the objective memo in [Example 1-A \(Chapter 1\)](#), the writer first described when a person would be "stopped."

An encounter is "mere conversation" if, under the totality of the circumstances, a person could not reasonably believe his liberty was restrained. *See, e.g., State v. Smith*, 698 P.2d 973, 975 (Or. Ct. App. 1985). A person can reasonably believe his liberty is restrained if he has been restrained by physical force or a show of authority by a police officer lawfully present in any place. Or. Rev. Stat. §131.605(6) (2007); *State v. Warner*, 901 P.2d 940, 942 (Or. Ct. App. 1995). If a person reasonably believes his liberty has been restrained, the person has been "stopped," and any evidence gathered as a result of the stop is admissible only if the stop is justified by reasonable suspicion. *State v. Spenst*, 662 P.2d 5, 6 (Or. Ct. App. 1983). To determine whether a person reasonably believes his liberty has been restrained, a court will consider the totality of the circumstances. *State v. Wenger*, 922 P.2d 1248, 1251 (Or. Ct. App. 1996).

Police officers are allowed to request information without restraining a person's liberty. *State v. Gilmore*, 860 P.2d 882, 883 (Or. Ct. App. 1993). In *Gilmore*, an officer requested identification from three people sitting in a truck. *Id.* When the defendant opened the glove compartment to retrieve his identification, the officer saw a gun and arrested the defendant for illegal possession of a firearm. *Id.* Although the defendant argued that he had been illegally stopped and that the evidence should be excluded from trial as a result, the trial court admitted the gun into evidence. *Id.* The Court of Appeals upheld that decision and explained that, even if the defendant felt he was not free to leave, such a belief was not objectively reasonable. *Id.* Although the officer requested identification, he did not require the defendant to alter his course or prevent him from leaving. *Id. But cf. Wenger*, 922 P.2d at 1251–52 (holding that the stop did occur where the uniformed officer prevented the vehicle from being driven away and the defendant believed his liberty restrained).

After explaining the law, the writer **applies the law** to the case.

In persuasive writing, attorneys use the same tools to make their arguments. Here, the attorney is using an analogy to make his argument. Just as in an objective analysis, analogies are much more effective when the writer compares specific facts from the prior case with the specific facts from the client's situation.

The most difficult aspect of writing persuasively is often addressing a weakness in your client's case. When addressing a weakness, you must explain why, despite that weakness, the outcome your client seeks is justified. In this paragraph, the writer addresses a weak fact—that Officer Ephgrave blocked Adams's car.

Here, the statement made by Adams was mere conversation, and not a stop, because Adams could not reasonably believe his liberty was ever restrained at any point during his encounter with Officer Ephgrave. Like the officer who asked for identification in *Gilmore*, here Officer Ephgrave wanted to learn if Adams was involved in the bank robbery. In addition, like the police officer in *Gilmore* who did not alter the defendant's course or prevent him from leaving, Officer Ephgrave did not alter Adams's course or prevent him from leaving. Officer Ephgrave asked Adams if he was planning to leave, to which he responded that he was not. Further, Officer Ephgrave said he would move his car whenever Adams needed to leave. According to Officer Ephgrave, Adams said, "Oh, okay. No problem." Therefore, even though Officer Ephgrave's car was parked behind Adams's car, Officer Ephgrave did not prevent Adams from leaving nor did he alter Adams's course. Adams could not reasonably believe that his liberty was restrained in this case and the statement was mere conversation.

In fact, Adams's encounter with Officer Ephgrave was even less restrictive than the encounter in *Gilmore*. Unlike the officers in *Gilmore* or *Wenger*, Officer Ephgrave was working undercover and was therefore not wearing a uniform. Adams believed he was talking to a civilian and should have felt even freer to leave than did the defendants in *Gilmore* or *Wenger* who were talking to uniformed officers.

Because Adams could not have believed his liberty was restrained, he was not "stopped." Thus, his statement "Yeah, I heard he even gave a strawberry lollipop to a kid in the bank" should be admissible at trial as mere conversation.

The **conclusion** requests the relief sought from the court. This section is very short and formulaic, often consisting of only a sentence or two in which you respectfully request that the court render a decision in your client's favor.

### **CONCLUSION**

For the reasons stated in the brief, the State requests that this Court deny Defendant's motion to exclude.

### III. The Argument: Presenting the Argument from Your Client's Perspective

The argument section is the heart of your trial brief. It's where you present your analysis and where you will convince the court that the solution you offer is the correct one. Although the "Argument" section in your brief will largely resemble the "Discussion" section in your memo, you may need to rethink how you present your arguments to maximize your opportunities to persuade the court.

#### A. Developing Your Theme

As you begin to develop your arguments, you may want to start by considering whether a theme emerges in those arguments that should be drawn out and highlighted for the judge.<sup>3</sup>

A "theme" is some unifying idea that quickly and simply explains why you win. The theme brings together the law and the facts in a way that justifies the end that your client seeks.

Having a theme is helpful because it counter-balances a problem that can arise when trying to tell a compelling legal story. A compelling legal story must account for all the relevant facts and law. A compelling legal story is, therefore, detailed and often lengthy. Keeping track of those details can be difficult. A theme can help the judge organize and make sense of the details within your story by providing a bottom line to which all those details connect.

One very famous theme comes from the O.J. Simpson trial: "If the glove does not fit, you must acquit." That single, catchy sentence explained the crux of O.J. Simpson's argument. Simpson was accused of killing his estranged wife and a local restaurant server at her home. Part of the evidence against him included a bloody glove found on Simpson's estate, and a matching glove found at the crime scene. In a surprising move, prosecutors had Simpson try on the exhibit during trial, but the glove did not fit. From that event, the defense latched on to a winning theme of the case, and Simpson was later acquitted of murder.

Although a theme can be very helpful, the theme of your argument may not, and probably should not, be nearly as catchy as the one used in the O.J. Simpson trial. When you are writing to a court, the judge and the court staff are trained to examine the legal issue within its procedural posture or legal standard. Although a theme can help you choose how to best frame or connect your arguments, the judge and the staff will ultimately focus on whether the legal standard is met. For that reason, your theme will most often be based on the legal standard for the issue before the court. For example, if you are opposing a motion for summary judgment, you will likely build a theme around the standard for denying a motion for summary judgment, as in [Example 19-C](#). If you want to overturn a jury verdict, you would build a theme around that standard, as in [Example 19-D](#).

#### Example 19-C • Developing a theme to oppose a motion for summary judgment

<b>The case</b>	You want to argue that summary judgment should not be granted.
<b>Legal standard</b>	Summary judgment may be granted only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." <sup>4</sup>
<b>Theme</b>	There <i>is</i> a "material issue of fact" and, therefore, summary judgment is inappropriate.
<b>Technique</b>	As frequently as possible (1) state that a genuine disputed issue of fact exists and that the fact is material, and (2) prove the dispute by pointing to contradictory factual assertions and prove that the factual dispute is material by explaining the relationship between the fact and the legal standard. Thus, the summary judgment standard becomes the touchstone to which you will return because it governs how the court will decide the issue.

#### Example 19-D • Developing a theme to overturn a jury verdict

<b>The case</b>	You want to argue that the court should overturn a jury's verdict.
<b>Legal standard</b>	A judgment of acquittal must be entered for any offense for which the evidence is insufficient to sustain a conviction. <sup>5</sup> Evidence must be viewed in the light most favorable to the winning party. <sup>6</sup>
<b>Theme</b>	Even considering the evidence in the light most favorable to the winning party, the evidence does not support the verdict.
<b>Technique</b>	For every element, and as frequently as possible, (1) assert that the evidence does not

support the element, and (2) prove the evidence does not support the element by bringing forward all the evidence put forward by the winning party and explaining why it cannot support the element. Thus, the standard for a judgment of acquittal becomes the touchstone to which you will return.

Themes may also arise out of substantive legal or policy arguments. Take, for example, the case *Oregon v. Ashcroft*.<sup>7</sup> In that case, the State of Oregon passed a statute that permitted physician-assisted suicide. The U.S. Attorney General then issued an interpretive regulation that would revoke the license of any physician who dispensed a controlled substance sufficient for a person to commit suicide under the state statute. If that interpretive regulation went into effect, it would prevent all physician assisted suicides. Thus, plaintiffs, a group that included the State of Oregon, sought to enjoin the Attorney General from enforcing his interpretive regulation. [Table 19-E](#) shows how the U.S. Attorney General might approach the argument for a motion to dismiss, and [Table 19-F](#) shows how the State of Oregon might approach its opposition to that motion.<sup>8</sup> As you can see, the U.S. Attorney General emphasized his statutory authority to regulate controlled substances, and the State of Oregon emphasized a State's authority to regulate medical practice.

#### **Table 19-E • Developing a theme for a motion to dismiss based on the substantive law**

<b>The case</b>	The State of Oregon passed a statute that permitted physician-assisted suicide. Under the Controlled Substances Act, the U.S. Attorney General issued an interpretive regulation that would revoke the licenses of physicians who prescribed drugs sufficient for an individual to commit suicide under the state statute. Among other things, the interpretive regulation stated that, “assisting suicide is not a ‘legitimate medical purpose’ within the meaning of [the Controlled Substances Act and its regulations].” <sup>9</sup> A group filed a complaint that sought to enjoin the Attorney General from enforcing that interpretive regulation. You are a U.S. Assistant Attorney General seeking to dismiss that complaint.
<b>Legal standard</b>	Under the Controlled Substances Act, “[a] prescription for a controlled substance ... must be issued for a legitimate medical purpose.” <sup>10</sup> The Attorney General has the authority to promulgate “rules and regulations ... relating to the registration and ... distribution and dispensing of controlled substances.” <sup>11</sup>
<b>Theme</b>	The Controlled Substances Act permits the distribution of controlled substances only for “legitimate medical purpose” and assisted suicide is not a “legitimate medical purpose.”
<b>Technique</b>	In brief, emphasize the everyday and historical understanding of “medicine” as “healing” and that Congress delegated to the Attorney General authority to regulate controlled substances. In this case, the U.S. Attorney General properly used that authority.

#### **Example 19-F • Developing a theme for a response opposing the motion to dismiss based on the substantive law**

<b>The case</b>	Same scenario as above, but you are an Assistant Attorney General for the State of Oregon, and you are arguing against the motion to dismiss and in favor of an injunction.
<b>Legal standard</b>	The clear statement doctrine: When “Congress intends to alter the ‘usual constitutional balance between the States and Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute.’” <sup>12</sup>
<b>Theme</b>	The U.S. Attorney General’s interpretive regulation is an unwarranted federal intrusion into the sovereign interests of Oregon, the medical practice of its physicians, and end-of-life decisions.
<b>Technique</b>	In motion, emphasize state’s historical right to regulate medical practice and that, in enacting the Controlled Substances Act, Congress meant to regulate drug trafficking, not medical practice. Thus, the U.S. Attorney General overreached his authority under the Controlled Substances Act.

When developing a theme, remember that it must be consistent with the law and facts relevant to the argument. In addition, to the extent that you can incorporate facts or concepts that are not in dispute, your theme is more likely to be accepted. For example, in [Examples 19-C](#) and [19-D](#), which illustrate themes based on a legal standard, no one can dispute the standard for summary judgment or overturning a jury verdict. Similarly, in [19-E](#) and [19-F](#) the themes were based on an undisputed substantive legal standard—the Controlled Substance Act.

Although having a theme is important, don't worry too much if a theme is not immediately evident. Like many aspects of the writing process, developing a theme is also a recursive process. You may not see a theme early on, but one may emerge after you have started organizing your arguments or developing the strengths and weaknesses of your case. Once a theme has emerged, you can go back and integrate that theme into your structure and argument.

## **B. Organizing Your Arguments**

The earlier parts of this book assumed that you had a single legal issue before you. However, when presenting a persuasive argument to a court, you must often address more than one issue. Thus, when writing to a court, you will need to consider how to organize multiple legal issues.

### **1. Organizing multiple claims within a brief**

When involved in litigation, attorneys usually think of legal issues in terms of the “claims” that those issues present. A “claim” is an assertion of a right that, if proved, entitles a party to relief. Usually, litigation will involve multiple claims arising from a single event. That's because, if a party fails to raise all the claims arising from a single event,<sup>13</sup> that party can be barred from raising a related claim in later litigation. Thus, most litigation will include multiple claims.

If a trial brief you are working on addresses multiple claims, you should consider the order in which to present those claims. Whenever possible, present your strongest claim or defense first. Leave weaker arguments for later.

Although that's the general rule, you may not always be able to present your strongest substantive claim first. Procedural issues—such as the court's jurisdiction or a statute of limitations—must be presented before the substantive claims because the court cannot proceed to the substantive issues until the procedural issue is resolved. In that situation, the procedural issue should be presented first, even if the procedural issue is not your strongest argument.

If your argument involves multiple claims, remember to start your argument section with a roadmap to those claims, as in [Example 19-G](#).

#### **Example 19-G • A roadmap to an argument section that addresses two claims**

##### **ARGUMENT**

Defendants John Ashcroft, in his official capacity as United States Attorney General, and Asa Hutchinson, in his official capacity as Administrator of the Drug Enforcement Agency, hereby oppose plaintiff's motion for a preliminary injunction. That injunction would prohibit the Attorney General from enforcing the Controlled Substances Act, 21 U.S.C. §§ 801-971, against doctors who prescribe federally controlled substances to help patients commit suicide. As explained below, the State of Oregon, the principal plaintiff in this case, lacks standing to seek an injunction against the enforcement of federal law against private parties and should therefore be dismissed from the case. Moreover, plaintiffs cannot sustain their burden of showing both a likelihood of success on the merits and irreparable injury absent a preliminary injunction.

Here, the roadmap explains the two issues the brief will address: (1) whether Oregon lacks standing, and (2) whether Oregon can sustain its burden of proof.

Finally, remember to review the number of claims or defenses you are presenting and seriously consider which weaker claims or defenses you can omit. As we mentioned above, judges and their staff are busy. It may be most persuasive to present two strong claims that will satisfy your client's needs rather than to present ten claims, which may bog down the court and weaken the strength of your client's case.

### **2. Organizing legal arguments within a claim**



Each claim is, in turn, made up of multiple legal arguments. In [Chapter 12, The Discussion Section](#), we discussed how to organize multiple legal arguments within a single claim (or legal issue).

You begin by drafting a roadmap section for the claim. A roadmap section in a trial brief is no different than a roadmap section in an objective memo. For each claim, the roadmap section (1) asserts your conclusion about that claim, (2) explains the governing rule for that claim, (3) disposes of any elements that will not be addressed in a full legal argument, (4) maps and assesses the remaining arguments (if necessary), and (5) concludes again.

In mapping out the remaining arguments, consider which order would be most advantageous. If, for example, you are counsel to a defendant in a contract dispute, and your research indicates that your strongest argument is that the consideration in the contract's formation was insufficient, you may consider leading with that argument. Remember, though, that most judges expect arguments to track the elements of a claim. If, strategically, you choose to deviate from the expected order, you should briefly discuss the reason for the change to the order of your arguments in your roadmap paragraph. You need to have a good reason to deviate from the traditional approach when doing so might confuse the court or make the court wonder whether you are putting off an argument because you lack confidence in it.

After providing a roadmap section, you will present the arguments about each element or factor within the claim in the order you indicated in the roadmap section.

### C. Explaining the Law from Your Client's Perspective

As we discussed in [Chapter 7, Explaining the Law](#), when presenting legal arguments in an objective memo, you craft rules and case illustrations to explain the law upon which your prediction rests. Similarly, in a persuasive argument, you will again craft rules and case illustrations to explain the law upon which your conclusion rests. In a persuasive argument, however, you will craft your explanation of the law so that it emphasizes those aspects of the law that are most important to your argument. Accordingly, you begin persuading as soon as you begin explaining. Below, we set forth some techniques to develop persuasive rules and case illustrations.

#### 1. Techniques to develop persuasive rules

The following techniques will help you craft persuasive rules: (1) explain rules consistently with your perspective or the theme you have developed, and (2) develop new rules that advance your argument.

##### (a) Draft rules consistently with your client's perspective

As you draft the rules, think about how you can emphasize those parts of the rule that are most helpful to you by considering whether to state a rule positively or negatively and whether to state the rule broadly or narrowly.

First, consider whether to state a rule positively or negatively. If you are arguing that a standard is met, then you should frame the rule positively so that it explains when the required standard is met. By contrast, if you are arguing that a standard is not met, then frame the rule negatively so that it explains when the required standard is not met. For example, if you are representing a client that is alleging gender discrimination, you will want to describe the rule so that it focuses on when discrimination takes place. If you are defending against a charge of discrimination, explain when a party complies with the law, as shown in [Example 19-H](#).

##### **Example 19-H • Drafting a rule consistently with your client's position by stating the rule positively or negatively**

**The rule as written** “A recipient which operates or sponsors interscholastic ... athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors: (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.”<sup>14</sup>

**Plaintiff** A university discriminates against its female students if it fails to effectively accommodate the interests and abilities of its female students.<sup>15</sup>

**Defendant** A university complies with Title IX if it effectively accommodates the interests and abilities of its female students.<sup>16</sup>

Similarly, consider whether to state a rule broadly or narrowly. Compare the explanations of the standard for granting summary judgment in [Example 19-I](#). Notice how the use of the word “only” in the second part of [Example 19-I](#) suggests that there are only limited circumstances in which summary judgment should be granted.

**Example 19-I • Drafting a rule consistently with your client’s position by stating the rule broadly or narrowly**

<b>The rule as written</b>	“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” <sup>17</sup>
<b>The moving party</b>	Summary judgment <b>must</b> be granted if there is no issue of material fact and the moving party is entitled to judgment as a matter of law. <sup>18</sup>
<b>The non-moving party</b>	Summary judgment may be granted <b>only</b> if there is no issue of material fact and the moving party is entitled to judgment as a matter of law. <sup>19</sup>

(b) Create rules that advance your client’s argument

In addition to drafting rules consistently with your perspective, you can also create rules that will advance your analysis. As we explained in Section 7.1, *Explaining the Law: Rules*, sometimes courts do not state explicitly the standards they used to conclude whether an element or factor is present. In those cases, patterns of judicial or legislative thinking exist. Before they are expressly articulated, those patterns are sometimes called “implicit rules.” As an advocate, one of the ways you can help your client is to make implicit rules explicit. By making implicit rules explicit, you will provide the court with a way to reach a conclusion that is consistent with existing law.

To make an implicit rule explicit (1) synthesize or identify a pattern in the cases that seems to explain why courts reach their conclusions, and then (2) craft a rule from the pattern that encompasses both the prior cases and your client’s case. Crafting the rule, however, may require you to explain the rule more broadly or more narrowly depending on the outcome your client is seeking. Let’s look at how you might do that.

Imagine that your clients are a four-year-old girl and her parents. While riding a bike, the four-year-old struck an elderly pedestrian. The estate of the elderly pedestrian has sued the four-year-old and her parents.<sup>20</sup> While you would like to argue that, as a matter of law, a four-year-old cannot be held liable for negligence, the case law is not entirely clear on that point. Some prior cases hold that four-year-olds, as a matter of law, cannot be held liable for negligence. Other cases, however, hold that four-year-olds can be held liable for negligence and that a jury should decide, based on the facts of the case, whether a particular four-year-old was negligent. Of course, you do not want the case to go to the jury; you want it dismissed. How can you shape the law to provide the court with an easy way to reach the conclusion you want it to reach? In reviewing the cases, as illustrated in [Table 19-J](#), you might see that in those cases where the child was held not liable as a matter of law the child was under the parent’s supervision. Thus, you begin to consider a rule that says, “A four-year-old child under the supervision of her parents cannot, as a matter of law, be held liable for negligence.”

**Table 19-J • Identifying a pattern in cases and crafting a rule that encompasses the prior cases and the facts of your client’s case**



Case	Holding	Facts
<i>Ehrlich v. Marra</i>	4-year-old cannot be contributorily negligent as a matter of law	Child of 4 years and 10 months “under direction of mother” was crossing the street when hit by car.
<i>Romanchuk v. County of Westchester</i>	4-year-old cannot be contributorily negligent as a matter of law	Child of 4 years and 11 months “under the direct supervision and control of the father” was sledding when accident occurred.
<i>Boyd v. Trent</i>	4-year-old not liable as a matter of law	Child of 4 years had climbed to front seat where mother permitted her to stay. Child distracted mother and a car accident resulted.
<i>Camardo v. New York State Railways</i>	Question for the jury	Child of 4 years and 10 months walking home from school, unaccompanied by adult, when accident occurred.
<i>Chandler v. Keene</i>	Question for the jury	Child of 4 years and 11 months was crossing street when hit by car. No mention of any parents.
<b>Proposed rule:</b>	A four-year-old child under the supervision of her parent cannot, as a matter of law, be held liable for negligence.	

After setting forth your proposed rule, you might then explain the law as in Example 19–K.

#### Example 19-K • Developing a favorable rule from case law

New York courts have consistently held that a four-year-old infant, who is under the supervision of an adult, is incapable of negligence. For example, in *Ehrlich v. Marra* the court held that a child of 4 years and 10 months could not be found guilty of contributory negligence. In that case, the child had been crossing the street “at the direction and under the supervision of his mother” when he was struck by a car. 300 N.Y.S.2d 81, 81 (N.Y. App. Div. 1940). Similarly, in *Romanchuk v. County of Westchester*, the court held that a child “then several days short of his fifth birthday ... must be deemed, as a matter of law, to have been free of contributory negligence” in a sledding accident. 337 N.Y.S.2d 926, 926 (N.Y. App. Div. 1972). In that case, the court noted that the child was “under the direct supervision and control of the father” when the father placed the child on a sled and the child then coasted down a slope by himself. *See id.* Most recently, in *Boyd v. Trent*, the court again held that a four-year-old could not be held liable for negligence. In that case, the four-year-old had extricated herself from her car seat and made her way to the front of the car where her mother, who was driving, permitted her to remain. Soon thereafter the mother failed to negotiate a turn and collided with another car. The court held that the four-year-old was “incapable of being held liable for negligence.” *Boyd v. Trent*, 746 N.Y.S.2d 191, 192 (N.Y. App. Div. 2002).

Again, you cannot be certain that the court will adopt your proposed rule, but by providing the court with a reasonable way to hold in favor of your client, you’ve done your job as an advocate.

## 2. Developing persuasive case illustrations

In addition to presenting rules in the most persuasive way, you will also want to present case illustrations of those rules in the most persuasive way.<sup>21</sup>

With respect to cases, you will usually be arguing one of two things: You will either argue (1) that your client’s case is like the prior case and the same outcome is warranted, or (2) that your client’s case is distinguishable from the prior case and, therefore, the prior case is not precedent for the current case.

Both of those arguments rely on comparing the facts of the prior case to the facts of the current case. Often times, comparing facts is a straightforward task: You review the court’s analysis of the legal issue; you determine what facts were central to the court’s decision about that legal issue; you determine whether you have the same facts or different facts; you then make your argument that your case is like or not like the prior case.

Sometimes, however, the comparison is more difficult. Usually, a comparison is more difficult if you want to base your argument on a factual similarity or distinction that was not obviously central to the prior court’s analysis (i.e., the fact is mentioned in the statement of the facts, but the court does not mention it when analyzing the particular legal issue).

In that instance, you need a process for determining whether the factual comparison or distinction you would like to draw is a good one. Let’s consider again the case of the four-year-

old bicyclist who struck an elderly pedestrian. Imagine, this time, that you represent the estate of the elderly woman who was struck by the four-year-old who was riding a bicycle. Your client, the estate of the elderly woman, would like to sue the four-year-old (and her parents) for negligence. Many cases say that the question of negligence goes to the jury. But one case, the *Romanchuk* case, holds that a four-year-old child who had been involved in a sledding accident could *not*, as a matter of law, be held liable for contributory negligence.

In reviewing the *Romanchuk* case, you notice that the sledding accident took place in a designated area. You wonder to yourself whether that fact could be the basis for distinguishing the *Romanchuk* case. After all, in this case, the four-year-old was not located in a designated bicycling area; rather, the child was on a city street.

You've identified the distinction, but can you rely on that distinction? To answer that question, you would first need to review all the other case law to determine whether there is a case in which the court held that a child who was in an accident in a designated play area could not be held liable for negligence.

Assuming you find no such cases, you will need to ask yourself: Is that distinction a reasonable one on which the court could distinguish the case? Arguably, it is. When a child is in a designated area, the child is appropriately paying less attention and should not be held liable for playing in an area designated for that purpose. By contrast, in an area not designated for that purpose, it is appropriate for a child to be held more accountable.

Assuming that the distinction makes sense, then you simply need to craft a case illustration that highlights the fact that will later form the basis of your case comparison, as seen in [Example 19-L](#).

#### **Example 19-L • Plaintiff describes the *Romanchuk* case, focusing on a favorable fact**

In the *Romanchuk* case, the child was sledding in a park designated for that activity when the child was struck by a parks' department vehicle. 337 N.Y.S.2d 926, 926 (N.Y. App. Div. 1972). The key fact in that case was not the child's age or the parent's supervision. Rather, the key fact was that the child was sledding "in an area of the park where such activities were permitted." *Id.* Thus, the jury could reach only one conclusion, that whoever was sledding in that area—regardless of age or parental supervision—was not contributorily negligent.

### **D. Addressing Weaknesses from Your Client's Perspective**

The aspect of persuasive writing that is most different from objective writing is addressing weaknesses in your argument. To be an effective advocate, you must be able to identify weaknesses in your argument and explain why, despite those weaknesses, your client's desired outcome is the most appropriate outcome. In other words, you must address the weaknesses from your client's perspective and not from your opponent's perspective. Minimizing the weaknesses of your case is sometimes easier said than done.

Often when we think about weaknesses and identify strategies to minimize those weaknesses, we think about how our opponent will exploit a certain facet of the law or a certain fact to the opponent's advantage. Thus, we tend to think about weaknesses from our opponent's perspective. As a result, a natural impulse is to first explain the weakness from an opponent's perspective and then explain why that perspective is incorrect.

While that approach works when lawyers address weaknesses in an objective analysis, that approach is ineffective when trying to persuade. If you first explain your opponent's argument, you will highlight, rather than minimize, your opponent's argument. Look at [Example 19-M](#), in which the writer presents the opposing argument first and then explains why that argument would not ultimately be successful.

#### **Example 19-M • Less effective approach: highlighting your opponent's argument**

Plaintiff addresses a weakness by first explaining that weakness.

Defendant's attempt to carve out an exception for four-year-olds who are supervised by an adult is unsupported by the weight of authority. Defendant has pointed to three cases, *Ehrlich*, *Trent*, and *Romanchuk*. In those cases, the courts have held that, as a matter of law, the four-year-old could not be held liable for negligence. In each of those cases, however, the parent was present when the alleged negligent act took place, thus distinguishing those cases from other cases.

After explaining the weakness, plaintiff turns to the counter-argument.

Although a few cases exist in which the court followed a bright-line rule, the majority of courts that have considered whether to follow the bright-line rule in *Ehrlich* have declined to do so. *See, e.g., Sun Jeong Koo v. St. Bernard*, 392 N.Y.S.2d 815, 816 (N.Y. App. Div. 1977) (considering *Ehrlich* but rejecting a bright-line rule in negligence case against a child of 4 years and 10 months); *Searles v. Dardani*, 347 N.Y.S.2d 662, 665 (N.Y. App. Div. 1973) (considering *Ehrlich*, but concluding that jury should decide whether a child of four and a half years was negligent). No court has followed *Trent* or *Ehrlich*. Thus, *Ehrlich*, *Trent*, and *Romanchuk* represent a minority view, and those cases should not be followed.

The danger in explaining your opponent's perspective first is that the judge may decide that your opponent's argument sounds correct before even reading your argument. You should not help your opponent in that way.

The fix, however, is easy. To the extent possible, avoid the first step. Do not explain the weakness from your opponent's perspective. Instead, skip right to the second step: Explain the weakness from your perspective. That is, explain *how* and *why*, despite that weakness, your client's position is, ultimately, the correct or just conclusion. [Example 19-N](#) shows you how.

#### **Example 19-N • More effective: present the argument from your perspective only**

Here, plaintiff's counsel has removed his explanation of opponent's argument.

The weight of authority does not support carving out an exception for four-year-olds who are supervised by an adult. The majority of courts that have considered whether to follow the bright-line rule in *Ehrlich* have declined to do so. Moreover, no court has followed either *Trent* or *Romanchuk*. *See, e.g., Sun Jeong Koo v. St. Bernard*, 392 N.Y.S.2d 815, 816 (N.Y. App. Div. 1977) (considering *Ehrlich* but rejecting a bright-line rule in negligence case against a child of 4 years and 10 months); *Searles v. Dardani*, 347 N.Y.S.2d 662, 665 (N.Y. App. Div. 1973) (considering *Ehrlich*, but concluding that jury should decide whether a child of four and a half years was negligent).

#### **Sidebar**

Attorneys commonly minimize weaknesses in their client's case by showing that an opposing party's argument is based on one or more of the following:

- An incorrect or incomplete view of the facts;
- An incorrect or incomplete view of the law;
- Case law that is distinguishable;
- A misapplication of a rule to the facts;
- Faulty rationale, reasoning, or policy arguments.

When considering how to address weaknesses in an argument, consider whether you can rely on any of the kinds of arguments listed above.

When initially drafting an argument, you may find it easier to first draft your opponent's argument and then respond to it, as in [Example 19-M](#). Doing so may help you clarify your opponent's argument and write a more effective response. But that is your *draft*. In the final product, eliminate as much of your opponent's argument as possible and construct the argument so that the court reads about the issue from your client's perspective.

You can see this technique at work if you compare [Examples 19-M](#) and [19-N](#). [Example 19-N](#), the more effective example, essentially skips over the explanation of the opposing argument and simply explains why the rule proposed by the opposing argument is wrong. Thus, in the more effective [Example 19-N](#), counsel addresses the opposing argument by explaining his view about that opposing argument: The proposed rule is unfounded in the law.

The paragraphs above discuss *how* to address a weakness. You must also think about *where* to address a weakness.

When deciding where to address a weakness, you have two good options: You can fully present your argument and, after presenting your argument, address the opposing argument, or

if the weakness doesn't merit a significant discussion, you can use a dependent clause to acknowledge, and then dispose of, the weakness. These two possible locations may sound familiar. As you may recall from Section 8.3, *Applying the Law: Counter-Analyses*, these locations are the same two locations in which you would address possible counter-arguments in an objective memo.

## **E. Other Ways to Shape Your Argument**

To help the court see a case from a client's perspective, attorneys use a variety of techniques to emphasize why the outcome a client seeks is a correct and preferable outcome to the one opposing counsel seeks.

Although this section discusses a variety of techniques attorneys use to present their arguments persuasively, these techniques do not work magic. Courts are populated with smart people. If the law and facts are not on your side, no amount of impressive prose will change the law or facts, and you are unlikely to prevail. That said, when you have an argument that might win, you can make it easier for the court to see why it should win. The techniques described below will help you do that.

### **1. Persuasion through location**

One of the best ways to emphasize your main points is to put them where a judge is most likely to see them. The eyes of most readers—including judges—tend to fall and rest upon a few positions of emphasis. Many of the techniques described below follow from this simple idea: Put information where a judge is most likely to see it, rest upon it, and absorb it. In particular, review your point headings, the first sentence of each paragraph, and the last sentence of each paragraph to ensure that you have used those locations effectively. By contrast, disclose information that is less helpful to you in the middle of a paragraph and in the middle of sentences. In those locations, the information will receive less emphasis.

### **2. Persuasion through point headings**

One of the first locations where your reader's eyes will rest will be on your point headings. Thus, in addition to using point headings to guide your reader through the organization of an argument, you will want to construct point headings that emphasize the main points of your argument that you want the court to accept.

To create persuasive point headings in your argument, follow the same advice we gave in [Chapter 12, The Discussion Section, Introducing and Connecting Arguments](#): First, make your point headings work. Each point heading should assert the conclusion you want the judge to reach when reading that section. Second, the point headings should work together so that they provide an outline of your argument. Finally, make your point headings look professional by using traditional formatting. We would recommend reviewing [Chapter 12, The Discussion Section, Introducing and Connecting Arguments](#), where these points are discussed in more detail.

Here, let's focus on the few ways in which you will want to tweak your point headings to make them most effective in your trial brief. All point headings have up to two parts:

- 1. The action you want the court to take or the conclusion you want the court to adopt, and**
- 2. The primary reason the court should take that action or adopt that conclusion.**

Of the point headings you will craft, you will need to think most carefully about the main point headings designated by Roman numerals. Those point headings designate a new claim. They should, therefore, assert the procedural action that you want the court to take with respect to that claim. Compare [Example 19-O](#) with [19-P. Example 19-O](#) is a more effective opening point heading because it tells the court the procedural action it should take.

**Example 19-O • A main point heading that asserts the procedural action the court should take**

**I. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED BECAUSE THE ADEA DOES NOT PERMIT DISPARATE IMPACT CLAIMS.**

**Example 19-P • A main point heading that does not assert the procedural action the court should take**

**I. THE ADEA DOES NOT PERMIT DISPARATE IMPACT CLAIMS.**

Because more than one element or factor will be argued within each claim, attorneys use sub-headings to alert the reader to each new element, factor, or part of the argument. These sub-headings provide the reader with an overview of the legal and factual support for the heading's conclusion. Therefore, an effective sub-heading often includes more specific facts or assertions than the point headings for dispositive issues. As you can see in [Example 19-Q](#), the sub-headings should support the conclusion in the main point heading and work together to present an outline of the argument.

**Example 19-Q • Example of a main point heading and supporting sub-headings<sup>22</sup>**

**I. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED BECAUSE THE ADEA DOES NOT PERMIT DISPARATE IMPACT CLAIMS.**

**A. The text of the ADEA precludes disparate impact claims.**

*1. Section 4(a) of the ADEA, which prohibits discrimination "because of age," prohibits only intentional discrimination.*

*2. Section 4(f) of the ADEA, which permits employers to consider "reasonable factors other than age," precludes a discrimination claim based on the impact of an employment decision.*

**B. The legislative history confirms that disparate impact claims are not cognizable under the ADEA.**

You will notice that in [Example 19-Q](#), not all the point headings state the conclusion counsel wants the court to adopt *and* the reason the court should adopt that conclusion. That's because the longer a point heading becomes the more difficult it is to absorb what the point heading is saying. If a point heading is becoming too long for the reader to absorb its meaning, you might consider stating the conclusion you want the court to reach in one point heading and the reason for that conclusion in a sub-heading.

Different practitioners have different ideas about when a point heading becomes too long and the importance of including both your conclusion *and* the primary reason the court should adopt that conclusion. So, if you are working with a more senior attorney, follow the senior attorney's preference.

Generally, most judges and attorneys prefer short point headings. We recommend aiming for two lines and not going beyond three lines. Your goal is to keep the point headings short but choose words that convey as much substance as possible.

**3. Paragraph-level persuasion**

The techniques for persuading at the paragraph level are straightforward. Although simple, these techniques are powerful. Their appropriate use will provide organization and direction to your reader and will be critical to the effective explanation of your argument.

**(a) Thesis sentences**

A "thesis" is a proposition put forward for consideration—one that the speaker intends to prove. Thus, no surprises here, a thesis sentence is a sentence in which that proposition is stated. By contrast, a "topic sentence" is a sentence in which the topic of a paragraph is described, but the sentence makes no assertion about a proposition to be proved.

Within the argument section of your trial brief, every single paragraph should begin with a thesis sentence. That's right: Every single paragraph should begin with a thesis sentence. The reason should be obvious. Each paragraph should assert one clear point. You will make it a whole lot easier for a judge to follow your argument if you tell the judge what the point of the paragraph is at the outset. The net effect will be that your thesis sentences will, together, form a skeletal outline of the argument you are presenting to a court.

Compare [Example 19-R](#), in which the first full paragraph uses a thesis sentence, with [Example 19-S](#), in which the first full paragraph does not. Notice how the thesis sentence tells the court the conclusion it should reach after reading the paragraph. In doing so, the thesis sentence shapes the way the court absorbs the information provided in the paragraph.



**Example 19-R • More effective approach: The thesis sentence tells what assertion the paragraph will prove**

... An officer establishes reasonable suspicion to search a suspect if the officer can point to specific and articulable facts that give rise to a reasonable inference that the person might pose an immediate threat. *See State v. Ehly*, 315 Or. 66 (1993).

With a strong thesis sentence, the judge now knows the writer's primary assertion and what point the paragraph will prove.

To establish a reasonable suspicion for a protective search, officers may rely on their knowledge that the defendant is involved in an activity associated with weapons and that the defendant associates with people who often carry weapons. For example, in *Ehly*, the court determined that officers had reasonable suspicion to conduct a protective search. *Id.* at 83. In that case, officers knew that the defendant was a drug user and that "many people who use illegal narcotics possess guns." *Id.* at 82. Moreover, the officers also knew that defendant was "running" with a person who carried weapons. *Id.* Because the defendant was rummaging through a gym bag with his hands concealed and did not respond to the officer's suggestion to dump out the contents of the bag, the court concluded that it was reasonable for one of the officers to dump the contents of the bag out on the motel room bed. *Id.* at 83.

**Example 19-S • Less effective approach: a paragraph with no thesis**

... An officer establishes reasonable suspicion to search a suspect if the officer can point to specific and articulable facts that give rise to a reasonable inference that the person might pose an immediate threat. *See State v. Ehly*, 315 Or. 66 (1993).

The writer omits the thesis sentence and jumps directly into the details of the case. The judge, however, will not get a good idea of the point the paragraph will prove.

For example, in *Ehly*, the court determined that officers had reasonable suspicion to conduct a protective search. *Id.* at 83. In that case, officers knew that the defendant was a drug user and that "many people who use illegal narcotics possess guns." *Id.* at 82. Moreover, the officers also knew that defendant was "running" with a person who carried weapons. *Id.* Because the defendant was rummaging through a gym bag with his hands concealed and did not respond to the officer's suggestion to dump out the contents of the bag, the court concluded that it was reasonable for one of the officers to dump the contents of the bag out on the motel room bed. *Id.* at 83.

To craft an effective thesis sentence, you will often have to wait until you already have a very strong first draft. At that point, you have a better understanding of what you want to say. Then, step back from each paragraph and ask yourself, "What point do I want to make in this paragraph? What conclusion do I want my reader to walk away with after reading this paragraph?" Often, look to the end of the paragraph. You may have already stated the point you wish to make there. Once you have determined the point that you wish to make in that paragraph, write that assertion in the first sentence.

So, after you have a reasonably strong first draft, go back and examine each paragraph, determine the point you want to make in that paragraph, then put that idea in the first sentence where your reader is likely to see it.

**(b) The middle of the paragraph**

The middle of the paragraph should, of course, relate to the thesis sentence. Although the sentences in the middle of the paragraph may not get as much attention as the first (or last) sentence of the paragraph, they are important and should support the paragraph's thesis. If you find that sentences in the middle of your paragraphs have ideas that do not relate to the thesis sentence, you may need to either move those sentences to another paragraph or create a new paragraph for those ideas.

The middle of the paragraph is also a good place to put information that is less favorable to your client but that you either have to disclose (because you are ethically bound to) or that you choose to disclose (to inoculate that information). As discussed above, information in the middle gets less attention. [Examples 19-T](#), [19-U](#), and [19-V](#) show the differences among paragraphs that place damaging information in the middle of the paragraph, damaging information at the outset of the paragraph and damaging information at the end. Which is more effective?

**Example 19-T • Legal standard emphasized in conclusion at the beginning and negative information buried in the middle of the paragraph<sup>23</sup>**

Here, because the writer must show that Plaintiff failed to provide “substantial evidence” to advocate that the Court should grant summary judgment for the Defendant, the writer places the conclusion at a point of emphasis—the beginning of the paragraph. The writer places another conclusion at the end. The writer also minimizes the blood alcohol content by using a dependant clause in the middle of the paragraph.

The facts in this case, even when viewed most favorably for the Plaintiff, failed to establish any “substantial evidence” of Moore’s intoxication. Although Moore’s blood alcohol level was .13, she did not demonstrate any outward signs of intoxication. Her speech was not slurred. She appeared to be in control of her body. She did not have the odor of alcohol. Because Moore exhibited none of these symptoms, Defendant Soto could not have known she was intoxicated.

**Example 19-U • Negative information at the beginning of the paragraph and conclusion at the end**

Here, although the writer starts with a dependent clause, because the negative fact is at the beginning of the paragraph, the factual argument appears overly defensive. The dual conclusions at the end are not as effective.

Although Moore’s blood alcohol level was .13, she did not demonstrate any outward signs of intoxication. Her speech was not slurred. She appeared to be in control of her body. She did not have the odor of alcohol. Because Moore exhibited none of these symptoms, Defendant Soto could not have known she was intoxicated. Therefore the facts in this case, even when viewed most favorably for the Plaintiff, failed to establish any “substantial evidence” of Moore’s intoxication.

**Example 19-V • Negative information at the end of the paragraph**

Here, although the writer begins and ends the paragraph with conclusions, because the factual weakness is attached to the ending conclusion, and not buried in the middle of the paragraph, it receives too much attention and nullifies the paragraph’s effectiveness.

The facts in this case, even when viewed most favorably for the Plaintiff, failed to establish any “substantial evidence” of Moore’s intoxication. She did not demonstrate any outward signs of intoxication. Her speech was not slurred. She appeared to be in control of her body. She did not have the odor of alcohol. Because Moore exhibited none of these symptoms that would support her blood alcohol level of .13, Defendant Soto could not have known she was intoxicated.

**(c) Final sentence**

The thesis sentence tells your reader the proposition you intend to prove in the paragraph, and repeating that point at the end of the paragraph can enhance the persuasive effect. Revisiting your main point in the last sentence closes the loop by establishing that you have now proven what your thesis sentence said you would prove. In addition, and as noted at the outset of this chapter, a reader’s eyes tend to rest on (and absorb) the first and last sentences of a paragraph, so that last sentence is an ideal place to remind the reader of the conclusion the reader should reach.

Look at [Example 19-W](#). In that example, you can see how a final sentence repeating the paragraph’s thesis helps drive home the point you want to make.

**Example 19-W • Repeating assertion in the final sentence**

The statement made by Adams was mere conversation, and not a stop, because Adams could not reasonably believe his liberty was ever restrained at any point during his encounter with Officer Ephgrave. Like the officer who asked for identification in *Gilmore*, here Officer Ephgrave wanted to learn if Adams was involved in the bank robbery. In addition, as in *Gilmore* where the officer only requested information but did not alter the defendant’s course, Officer Ephgrave did not alter Adams’s course or prevent him from leaving. Officer Ephgrave asked Adams if he was planning to leave, to which he responded that he was not. Further, Officer Ephgrave said he would move his car whenever Adams needed to leave. According to Officer Ephgrave, Adams said, “Oh, okay. No problem.” Therefore, Officer Ephgrave did not prevent Adams from leaving nor did he alter Adams’s course. Adams could not reasonably believe that his liberty was restrained in this case, and the statement was mere conversation.

Although having a final sentence that reiterates the original thesis is helpful, occasionally such a sentence is overly repetitive or adds length unnecessarily. In those cases, omit the final, repetitive sentences. In most cases, though, hammer home your point by restating your thesis in the final sentence of a paragraph.

#### 4. Sentence-level persuasion

Just as paragraphs can be shaped to present your arguments more persuasively, individual sentences can be shaped to present information more persuasively too.

##### (a) Beginning, middle, and end of sentences

The same location guidelines that apply to paragraphs, apply to sentences. Readers tend to absorb information at the beginning and end of sentences; readers pay less attention to information in the middle.

Compare [Example 19-X](#) with [Example 19-Y](#). Can you see how the same information in different locations is emphasized differently? Thus, think carefully about where you locate information within a sentence.

##### Example 19-X • Negative information beginning of the sentence

Here the negative information appears at the beginning of the sentence, which is a point of emphasis. Because of the location of the negative information, the writer must counter the impact of the negative fact with specific facts to minimize the impact of this weakness.

Even with a blood alcohol level of .13, Moore did not demonstrate outward signs of intoxication such as having slurred speech or smelling of alcohol.

##### Example 19-Y • Negative information in the middle of the sentence

Here the negative information appears in the middle of the sentence minimizing its impact and allowing the reader to focus more fully on the lack of outward signs of intoxication.

Moore did not demonstrate outward signs of intoxication consistent with a blood alcohol level of .13 because she did not demonstrate outward signs of intoxication, her speech was not slurred and she did not smell of alcohol.

##### (b) Subjects and verbs

Another focal point of a sentence is the subject and verb. Readers naturally want to know “who did what,” and they will seek out that information first. Thus, you will make your point easier to absorb if you place the subject and verb close together and at the beginning of the sentence’s main clause. Compare [Example 19-Z](#) with [Example 19-aa](#). In the first example, [Example 19-Z](#), the subject and verb are far apart. In the second example, [Example 19-aa](#), subject and verb are close together. Can you see how, as a result, the sentence in the first example is more difficult to absorb?

##### Example 19-Z • Subjects and verb far apart

Guzman, after barging into the bank and directing patrons out of the way, did not point the gun at the teller, but instead merely directed commands at her.

##### Example 19-aa • Subject and verb close together

Subject = “Guzman”

Verb = “did not point”

Notice how the point of the sentence is easier to absorb when the subject and verb are brought close together.

After barging into the bank and directing patrons out of the way, Guzman did not point the gun at the teller but merely directed commands at her.

##### *i. Subjects*

Although, usually, you should prefer to clearly name “who did what,” there are times when clearly naming “who did what” is not to your advantage. When you do not want to call attention to “who did what,” then you should use passive voice.

Passive voice is a difficult concept for many. It refers to whether a sentence clearly states *who* is doing the action. Passive voice is most easily understood by comparing it to the active voice.<sup>24</sup> In the active voice, the main actor is the “be-er” or the “do-er” (the subject) of the



sentence. By contrast, in a sentence written in the passive voice the main actor is no longer the “be-er” nor a “do-er” of the subject. Rather, the subject is acted upon by another force.<sup>25</sup> With passive voice, the reader is left to wonder who *did* the action.

[Example 19-bb](#) is written in the active voice, while [Examples 19-cc](#) and [19-dd](#) are written in the passive voice. In the first example, [Example 19-bb](#), the executive is the subject of the sentence, and he is the “do-er” because he “terminated the plaintiff’s employment.” Because the subject is the “do-er,” that sentence is in the active voice. By contrast, in the next two examples, [Examples 19-cc](#) and [19-dd](#), “termination” is the subject, but “termination” is not doing anything. Rather, in [Example 19-cc](#), the employment termination is being authorized by the executive, and in [Example 19-dd](#), some unnamed force is authorizing the employment termination. Thus, those two sentences are passive voice.

#### **Example 19-bb • Active voice**

The executive terminated the plaintiff’s employment without prior notice.

#### **Example 19-cc • Passive voice**

Termination of the plaintiff’s employment was authorized by the executive.

#### **Example 19-dd • Passive voice**

Termination of the plaintiff’s employment was authorized.

You might prefer passive voice to active voice on two occasions. The first occasion is illustrated in the last example, [Example 19-dd](#). A writer may actually prefer to focus on the fact that it was an authorized termination of employment, rather than focus on who provided the authorization. In that case, passive voice is appropriate.

In addition, a lawyer will likely prefer the passive voice when the lawyer must acknowledge something less-than-wonderful that his client did, as in [Example 19-ee](#). In that case, the lawyer will use the passive voice to de-emphasize his client’s role.

#### **Example 19-ee • Passive voice**

The cyclist was hit in the intersection.

Although passive voice has its uses, remember that, as a general rule, active voice is easier for your reader to absorb and makes for more evocative, stronger writing. Thus, prefer the active voice.

#### *ii. Verbs*

When selecting verbs, go for strong verbs that show action. In [Example 19-ee](#) above, for instance, the sentence could be rewritten with active verbs for punch. Saying the driver collided, hit, bumped, crashed, or missed the cyclist elevates the impact and visual image in the sentence.

Also, avoid the “it is” or “there is” structure in a sentence when the “it” and the “there” do not actually refer to a specific subject. We often use the phrases “it is” and “there are” when we speak, but when written, those structures create a wordier sentence. They also obscure the subject of the sentence by creating a false subject (“it” or “there”) at the sentence’s beginning. Thus, instead of saying, “There are five factors that the court considers,” say instead, “The court considers five factors.” The latter sentence is shorter and simpler, and the reader can easily find the subject and the action.

#### **(c) Dependent clauses**

Dependent clauses are a wonderful way to acknowledge less than favorable information. A dependent clause is a group of words that have a subject and verb but cannot stand alone. (In [Example 19-ff](#), the phrases beginning with “although” are dependent clauses.)

The important point about dependent clauses is that the actual subject and verb of the sentence are located elsewhere. Because readers naturally look for the subject and verb of a sentence, the subject and verb of a sentence receive more attention. By putting information in a part of the sentence that is separate from the subject and verb, you will deemphasize that information. Compare the two different versions of the sentence in [Example 19-ff](#). Can you see

how the emphasis of the sentence changes as information moves from the dependent clause in version 1 to the main clause of the sentence in version 2?

**Example 19-ff • The dependent clause receives less emphasis**

Version 1: Although Moore's blood alcohol level was .13, she did not demonstrate any outward signs of intoxication.

Version 2: Although she did not demonstrate any outward signs of intoxication, Moore's blood alcohol level was .13.

Be careful, though, about putting a dependent clause in the first sentence of a paragraph. The first sentence of a paragraph is emphasized. Thus, you may undo your efforts to de-emphasize information if that information appears at the beginning of a paragraph.

**(d) Short sentences**

Short sentences add punch. Use them. Sparingly.

**Example 19-gg • Too many short sentences**

Officer Ephgrave pulled into the lot. He parked his car behind the defendant's car. The defendant yelled to move the car. Officer Ephgrave walked over to the defendant. He asked if the defendant was planning to leave. The defendant said, "No, I'm going to sit a little longer." Officer Ephgrave said no other parking slots were available. Officer Ephgrave said he could move. The defendant said, "Oh, okay. No problem."

Although we love a punchy, short sentence, a short sentence has punch only when placed in contrast to longer sentences. Thus, if every sentence you use is short and punchy, the resulting read will be bumpy, like riding a bike over cobblestones. A short sentence has more effect if interspersed among longer, flowing sentences.

And remember that if you use a short sentence, place the short sentence somewhere where it will be seen. The first or last sentences of a paragraph are good places for short, strong sentences.

#### IV. The Remaining Parts of a Trial Brief

Your argument is the heart of the trial brief and will likely absorb the greatest part of your time and attention; however, the remaining parts of the trial brief—(1) the caption, (2) the introduction, (3) the statement of facts, and (4) the conclusion—must be equally well-developed.

##### A. Caption

The caption gives the procedural details of a motion. It includes the name and division of the court in which the case is proceeding, the parties, and the docket number. The caption should appear at the top of the brief or document. The caption also includes the title of the document. Usually, the title will be in all capital letters.

Your firm or organization will likely have a template for the caption that meets the local court rules. Even so, take time to make sure the names and numbers in the caption are correct and that the caption is neat in appearance.

##### Example 19-hh • The caption

IN THE STATE OF OREGON FOR  
LANE COUNTY CIRCUIT COURT

**The caption** states the court in which the case is being heard, lists the parties, provides the docket number, and states the title of the document.

State of Oregon,  
Plaintiff,  
  
v.  
  
Paul R. Adams,  
Defendant.

No. 14-285 CR

RESPONSE TO  
DEFENDANT'S MOTION  
TO EXCLUDE EVIDENCE  
FROM TRIAL

##### B. Introduction

Most trial briefs begin with an introduction that provides an overview of and context for the arguments that are to follow. The name of the introduction varies from jurisdiction to jurisdiction. It might be called an "Introduction," a "Preliminary Statement," a "Summary," the "Statement of the Nature and Matter Before the Court," or something else entirely.<sup>26</sup>

Whatever it's called, the introductory material usually establishes the procedural posture of the case, the nature of the litigation, and the kind of motion before the court. In some jurisdictions, the introductory material also presents a quick preview of the arguments.

In those jurisdictions in which the introduction describes only the procedural posture, the nature of the litigation, and the kind of motion before the court, the introduction usually has a more objective tone, as in [Example 19-ii](#).

##### Example 19-ii • An introduction describing the procedural posture, nature of the case, and motion before the court

**INTRODUCTION**

On November 29, 2000, Plaintiff Julie Stark was dismissed from her employment with defendant Michigan Power & Electric Company (MPE). Immediately after her dismissal, Ms. Stark filed a complaint alleging that Michigan's Whistle-blowers' Protection Act protected her from discharge. This motion for summary judgment seeks to dismiss her Whistle-blowers' claim because no material issues of fact exist, and as a matter of law, Ms. Stark cannot prove that she was engaged in an activity protected by Michigan's Whistle-blowers' Protection Act.

If you are in a jurisdiction that provides a short preview of the arguments, your introduction might look like [Example 19-jj](#).

##### Example 19-jj • An introduction that also previews the argument

## INTRODUCTION

Defendant Paul Adams's statement to an undercover police officer should be admitted into evidence at his trial for bank robbery. The State of Oregon filed charges against Adams for an alleged bank robbery on August 15, 2012. Adams was arraigned on August 20, 2012. He has pleaded not guilty, and the trial is set for September 16, 2012. Shortly after the robbery, Adams spoke to an undercover police officer. That statement implicated him in the robbery. Defendant Adams now moves to suppress that statement. Oregon law, however, allows a defendant's statement to be admitted into evidence where, as here, the statement was made during "mere conversation" with a police officer. Because Adams's statement was made during a conversation, his statement should be admitted into evidence.

In jurisdictions that permit or require an overview of the arguments, practices vary with respect to the degree of advocacy displayed in the introduction. [Example 19-jj](#) provides a fairly objective preview to the argument before the court. [Example 19-kk](#), by contrast, is both a more complete summary of the arguments and more aggressively persuasive.

### **Example 19-kk • An introduction that previews the arguments more fully and more aggressively**

Some jurisdictions put introductory procedural information before the section labeled "Introduction." As always, check your local rules and ask about local customs.

Defendant Northeastern University of Utah moves this Court pursuant to Federal Rule of Civil Procedure 56(a) to enter judgment for Northeastern University as a matter of law and dismiss the complaint brought by Plaintiff Tanya Ojuka.

This Introduction is an example of a jurisdiction in which the introduction provides a more aggressively persuasive summary of the arguments to come.

## INTRODUCTION

Plaintiff's action under Title IX of the Education Amendment of 1972 fails because the University complies with Title IX. Northeastern University made the difficult decision to eliminate its women's golf team after the State of Utah cut funding to the University by thirty percent. Thus, the University was forced to sell its golf course. However, after eliminating the women's golf team, the University established a women's competitive cheer team of twenty-four players, expanding its women's athletic program by twelve positions.

Northeastern complies with Title IX because it has a history and continuing practice of program expansion. The addition of the women's cheer team is yet one more step in that history of expanding opportunity. Since Northeastern began its women's athletic program in the 1970s, the University has more than doubled the number of athletic opportunities available to its female students. The competitive cheer team is yet one more addition to this history and continuing practice of program expansion because it, too, increases the number of equal athletic opportunities available to women.

Because Northeastern University can show a history and continuing practice of program expansion, the University is in compliance with Title IX and is entitled to judgment as a matter of law.

Especially in those jurisdictions that preview the arguments to come, the introduction plays an important persuasive role. It sets forth your vision of the precise legal question and the most important facts the judge should consider while reading your brief. And, of course, the introduction is the first part of the trial brief that the judge will read.

Although the introduction can (and should) play a persuasive role, the tone should still be reasonable. Introductions framed too passionately can trigger a defensive attitude or heightened skepticism in the reader. By presenting yourself as a reasonable advocate, the judge will be more likely to trust the path you are encouraging the court to take.

## **C. Statement of Facts**

A statement of facts typically follows the introduction.<sup>27</sup> As with an objective statement of facts, a persuasive statement of facts provides the factual foundation for your legal analysis. Thus, in both an objective and a persuasive statement of facts, you must provide *all* the facts relevant to the analysis, whether those facts will help or hurt your client. Also, as you would with an objective statement of facts, you must consider how to organize those facts in a way that will make them easy for your reader, in this case, the court, to absorb.

At the same time, in a persuasive trial brief, the statement of facts should tell your client's story and provide the foundation for your theory of the case. To do so, you will use the same types of facts that you would use in an objective memo: legally significant facts, background facts, and emotional facts. In a persuasive statement of facts, however, you will also work to highlight the facts that will help your client and minimize the facts that might hurt your client (or at least present those facts in context).

This section discusses the types of facts to include, how to organize, and how to refine your persuasive statement of facts.

## 1. Types of facts to include

Whether you call them “determinative,” “key,” or “critical” facts, include every fact that will affect the analysis of the case. Because readers—especially judges—do not like to be surprised, make sure every fact used in the argument section is in the fact section.

Continue to eliminate those background facts that are only remotely attached to your theory of the case. In a persuasive document, you have more opportunity to include emotional facts that are not necessary to resolve the issue, but that may shed light on the parties' actions or cause a reader to feel sympathy for one party or distaste for another. Be selective in which emotional facts you choose. Throwing in every sympathetic fact for your client may backfire. Courts are not often swayed by emotion, and the court may be skeptical of the brief's objectivity if the statement of facts contains too many emotional or self-serving facts.

Examine [Example 19-II](#) to see how the writer incorporated both background facts and emotional facts to tell her client's story. Do the emotional and background facts help tell a compelling story or does the writer use too many?

### Example 19-II • Using background fact and emotional facts

**Background facts** are facts that provide context for understanding your client's situation. Here, background facts about Ms. Garrett's employment history help the reader make sense of the story and why she brought the lawsuit.

On February 15, 2012, Ms. Rebecca Garrett, an experienced employee of Ramsey, Inc. with a black-belt in karate and a master's degree in counseling, was denied a promotion to the position of first-shift Boys Group Leader because of her sex. (Dewey Dep. 30:4-18, September 17, 2012.) Leading up to this denial, Ms. Garrett had worked for the company in its operation of Lincoln Juvenile Detention Center in Macon County, Georgia, for three years. (Priddy Dep. 27:3-9, October 22, 2012.)

**Emotional facts** are facts not necessary to resolve the legal issues but that help the reader to understand what motivated the parties to act in a certain way or to feel sympathy toward one party or distaste for another party. Here, the emotional facts showing that Ms. Garrett had a black-belt in karate, a master's degree in counseling, and superior job performance ratings in all categories leads the reader to believe that she was qualified for the job and that only her sex stood in her way. In other words, those facts generate sympathy for the plaintiff.

During Ms. Garrett's employment, she advanced from a third-shift Girls Group Leader to a second-shift Girls Group Leader and acquired a more comprehensive range of job duties. (Garrett Aff. 6, August 28, 2012.) Ms. Garrett consistently performed her duties to her supervisor's satisfaction and received superior ratings in all categories in her annual performance reviews. (Dewey Dep. 30:17-10.) When she learned that a first-shift Boys Group Leader was opening, Ms. Garrett applied assuming that she was the ideal candidate given her superior performance ratings, her seniority, and Ramsey's preference to promote from within. (Garrett Aff. 7.) In fact, Helga Dewey, Ramsey's Director of Human Resources, explicitly told Ms. Garrett she was qualified for the job in all respects except that she was not male. (Dewey Dep. 30:20-21.) However, company policy requires that Boys Group Leaders be male for safety.

Never omit facts just because they are bad for your case. If you omit a negative fact, you lose the opportunity to present that fact in context and minimize its impact. Moreover, your work will be more credible and trustworthy if the judge sees that you have forthrightly presented *all* the facts. Finally, the judge will see the negative facts anyway when reading the opposing party's brief and examining the record or supporting documents. Instead of running from negative facts, take advantage of the opportunity to couch the negative facts in a way that supports your theory of the case. The next section provides techniques for doing just that.

## 2. Organizing Your Statement of Facts

You should always start the facts in a way that will grab the reader's attention and provide necessary context for you to tell your client's version of the story. The facts are usually

organized chronologically, topically, or perceptually, depending on the type of issues you are presenting and the complexity of the story.

In telling your client's story, use one or a combination of the same strategies previously discussed in [Chapter 14, \*Statement of Facts\*](#). The first paragraph or two should always provide context for your reader by explaining who the parties are, their status in the story, and the crux of the conflict. Giving even minimal context is more effective than jumping into the details of the story. In addition, when constructing a persuasive statement of facts try to choose facts that not only provide context but that also grab the reader's attention and generate sympathy or positive emotions toward your client.

[Example 19-mm](#) provides context and begins to generate sympathy for an employer who has fired an employee. In that case, the employer's perspective is that the employee is suing the company because she is a disgruntled employee who has been fired. Thus, the employer's statement of facts opens up with the fact that she received a negative job review and was fired. A statement of facts in that same case, but written from the employee's perspective, would open in a different way, as in [Example 19-nn](#).

**Example 19-mm • The opening paragraph in a persuasive statement of facts (defendant's perspective)**

Plaintiff Julie Stark was an employee of defendant, Michigan Power and Electric (MPE). In late 2012, Ms. Stark received a negative employment review. (Dep. Julie Stark 10:1-2, Dec. 30, 2013.) On November 29, Ms. Stark was dismissed from MPE. (*Id.* at 10:21-22.) Four days after she was dismissed, Ms. Stark filed a complaint with the state attorney general alleging that MPE had violated the federal Clean Air Act. (*Id.* at 11:1-4.) Ms. Stark contends that she should be protected from dismissal because she was about to report her allegations when she was dismissed. (Pl.'s Compl. ¶15, Dec. 6, 2013.)

**Example 19-nn • The opening paragraph in a persuasive statement of facts (plaintiff's perspective)**

Plaintiff Julie Stark, a long-time employee of defendant Michigan Power & Electric, has also been a long-time advocate for a healthy planet. Thus, in October 2000, when Julie Stark discovered that MPE might be ignoring environmental regulations, she spoke out. Thereafter, MPE fired her.

After providing an opening that introduces the parties and the problem from your client's perspective, you must decide on an organizational structure for all the facts that follow. You can organize chronologically (telling facts in the order in which the events occurred), topically (presenting facts by topics like issues or categories), or perceptually (presenting facts from the various participants' vantage points). Facts are usually set forth in chronological order. Because readers expect facts to be told in sequence, chronological order is easiest to absorb. Other organizations may be more effective in some situations. For instance, if your case involves a business transaction in three states, a topical organization divided by locale might be easiest to understand.

As with a predictive memo, you may use a combination of these three strategies. You may have a topical organization, but then tell the facts chronologically within each topic.

The last paragraph is also important. The last paragraph should provide a smooth transition to whatever section is next in the brief. You may reiterate the factual posture of the case or what your client is seeking. No matter how you end your statement of facts, use the last sentence as a bridge to the next brief section.

### **3. Refining the Statement of Facts**

As they do when drafting objective statements of fact, attorneys draft their persuasive statements of fact at different times—some before the argument section of the brief is started, some after the argument section is finished, and some write both sections simultaneously. No matter when you initially draft the statement of facts, you will want to spend time revising the facts after the argument section of the brief is finished to ensure the section is accurate, complete, succinct, and that it effectively supports the analysis. The following tips will help you draft a more persuasive statement of facts.

Facts should be written in a way that subtly evokes empathy for your position, without sounding overly emotional or passionate. You will want a tone of that suggests objectivity



while presenting the facts in a way that supports your theory of the case.

Review [Example 19-oo](#). That example shows how a statement of facts in an objective memo might be transformed for purposes of a persuasive trial brief. Both examples are written from the perspective of an employer. The objective statement of facts is written at the time the employer is considering firing the employee, while the persuasive statement of facts is written at a time when the employer has to defend that decision.

### Example 19-oo • Comparing objective versus persuasive facts

#### Facts in an objective memo addressing whether an employee can be fired

##### STATEMENT OF FACTS

MPE intends to discharge Julie Stark, an employee in its customer service department. Stark is a known supporter of environmental causes. On occasion, she participates in environmental rallies, which causes her absence from work. In the past, Stark received positive job performance reviews.

Following the departure of MPE's chief executive nearly a year ago, Stark began to cause problems for MPE. About three months ago, Stark attempted to unionize MPE's operators. More recently, Stark objected to what she alleged were violations of the Clean Air Act by MPE. MPE's management responded by giving Stark an unfavorable job performance review. Upon receipt of the performance review, Stark approached her supervisor and made personal attacks towards both her supervisor and MPE's president. In addition, Stark threatened to tell "everyone" including the media that MPE's practices allegedly violate the Clean Air Act.

A few days later, MPE's president was walking through the office late at night and found on Stark's desk a complaint to the Attorney General's office. The complaint, which was drafted by Stark and dated approximately a month ago, listed the provisions of the Clean Air Act that Stark alleged MPE violated.

Stark currently is on vacation and will return to work on November 26. MPE intends to discharge Julie Stark when she returns which, due to Stark's vacation, will be three business days after MPE became aware of Stark's complaint to the Attorney General's office.

#### Facts in a brief defending the decision to fire the employee

##### STATEMENT OF FACTS

Plaintiff Julie Stark was an employee of defendant, Michigan Power and Electric (MPE). In late 2012, Ms. Stark received a negative employment review. (Dep. Julie Stark 10:1-2, Dec. 30, 2013.) On November 29, Ms. Stark was dismissed from MPE. (*Id.* at 10:21-22.) Four days after she was dismissed, Ms. Stark filed a complaint with the state attorney general alleging that MPE had violated the federal Clean Air Act. (*Id.* at 11:1-4.) Ms. Stark contends that she should be protected from dismissal because she was about to report her allegations when she was dismissed. (Pl.'s Compl. ¶15, Dec. 6, 2013.)

Ms. Stark was not about to report her allegations at the time of her dismissal. Sometime during the first few days of October, Ms. Stark downloaded a complaint form from the state attorney general's office, filled it out with allegations against MPE, and saved it to her computer. (Dep. Julie Stark 11:6-11:18; *id.* at Ex. 1.) She never submitted the complaint—not that month, nor the following month. (*Id.* at 11:22-12:1.)

During that time, what she did do was express her anger at receiving a negative job review. (Dep. Eric Stark 22:3-23:12.) On October 6, Ms. Stark and her supervisor, Eric Block, reviewed her job performance. (*Id.* at 18:6-8.) Her evaluation stated, among other things, that she "fails to follow directions" and that she "lacks the degree of teamwork and cooperation that MPE seeks in its employees." (*Id.* at Ex. 1.) Ms. Stark responded by yelling at her supervisor that MPE was a bunch of "mega-polluters" and "criminals," that they would "live to regret it," and that she would "tell everyone." (*Id.* at 24:2-25:15.) Eric Block, her supervisor, did not know what Ms. Stark was referring to. *Id.* at 26:4-8.

Two months followed Ms. Stark's exchange with her supervisor. Still, she did not submit any complaint to the state Attorney General's office or to any other public official. (Dep. Julie Stark 11:22-12:15.) In fact, it was not until Monday, December 3, 2012, four days after she was dismissed from MPE, that Ms. Stark submitted her complaint. (*Id.* at 10:21-11:4, 11:19-12:2.) Thus, until she was discharged, Ms. Stark allowed her complaint to languish for months.

The persuasive statement of facts in [Example 19-oo](#) uses several techniques, discussed below, to present the facts in a way that supports the employer's theory of the case. As we review those techniques, we will return to this example.

#### • Highlight favorable facts and minimize unfavorable facts through their location

One way to highlight favorable facts is to put them in "positions of emphasis"<sup>28</sup> within the brief. Positions of emphasis include the beginning and end of the fact section, the first and last sentences of any paragraph, and anywhere in a point heading (if using point headings to divide facts).<sup>29</sup> As we discussed in Section III.E.4.c, *Dependent Clauses*, above, placing difficult facts in a dependent clause at the beginning of a sentence is one way to minimize their impact. Be careful in overusing this technique—too many dependent clauses in a row can be distracting to the reader.

#### • Discuss favorable facts in greater detail than weak facts

Another way to highlight favorable facts is to describe those facts in more detail and to give those facts more "air time." Facts that are not as favorable can be described with less detail and addressed more quickly.

In [Example 19-oo](#), above, notice the “air time” given to the idea that Ms. Stark was not taking any action with respect to her complaint. Lack of action helps prove that Ms. Stark was not “about to report” at the time she was fired, an important point for the employer. Thus, the employer’s statement of facts states “she was not about to report the facts,” “[s]he never submitted the complaint—not that month, nor the following month, and “[t]wo months followed ... [s]till, she did not submit any complaint.” By repeating that important fact, the employer emphasizes the employee’s lack of action.

- **Minimize unfavorable facts by pairing them with favorable facts**

You can also minimize the impact of an unfavorable fact by pairing a weak fact with a favorable fact in the same sentence or paragraph. [Example 19-pp](#) minimizes the impact of an unfavorable fact by putting it in a dependent clause (where it gets less attention) and by pairing it with a positive fact.

In an argument about whether a client had “exclusive possession” of land, the fact that others were allowed to harvest vegetables is a negative fact. Thus, in the statement of facts, that negative fact is paired with a more positive fact that shows “exclusive possession.”

**Example 19-pp • Example of using a dependent clause to pair a negative fact with a positive one**

Although neighbors harvested and kept some of the vegetables, the Neros granted explicit permission for them to do so.

That same technique—coupling a bad fact with good facts—is used in [Example 19-pp](#). In that example, it’s bad for the employer that Ms. Stark threatened to tell people about the employer’s possible environmental misdeeds. That fact can help the employee establish that she was “about to report.” Thus, the employer provides context for that fact—namely that her threat occurred because the employee was angry. That fact suggests that the threat was simply a heated statement, not one the employee actually intended to act on.

- **Never overstate or misrepresent a fact**

Although you want to present the facts from your client’s perspective, never overstate or misrepresent a fact. Overstating or misrepresenting the facts not only triggers ethical questions about your practice, but doing so can alienate your reader, especially if the reader is a judge. Your facts will not always be good. Some facts will probably be quite detrimental to your case. While you can highlight good facts, never promise what you cannot deliver. In our zeal to be good advocates, it is easy to stretch the facts to serve our client, particularly when you know your client has been wronged. In telling your client’s story, however, you want to make sure you protect your credibility by always telling the truth and never exaggerating or lying.

- **Designate key players by their status in the story, not in the litigation**

Refer to the primary parties in the story by their names and designation in the story. Introduce minor characters in the story by name and designation, but you may refer to them by their designations in the remainder of the fact sections. For example, after introducing a minor player like “Investigating Detective Jerry Briscoe” or “Director of Operations, Erin Nalle,” in the facts, you can then just refer to the party by the designations of “the investigating officer” or “Director of Operations” in the facts and argument sections. Keeping track of too many minor players’ names becomes tiresome and distracting for the judge.

- **Cite the facts**

Cite the source of your facts. If the facts came from witness statements, interrogatories, depositions, police reports, or so forth, tell the judge where the fact can be found.<sup>30</sup> As in [Example 19-qq](#), peppering your statement of facts with citations to the record shows that your description of the events is grounded in reality. In addition, citations make it easier for the judge to find the fact you are describing. Thus, when writing your facts, you should cite nearly every sentence. The only kinds of sentences that you might not cite are those that summarize other facts. The underlying facts, the ones that support the summary statement, will of course be cited.

**Example 19-qq • Citations in your statement of facts**



Defendant Jennifer Soto received a telephone call from her neighbor, Allison Moore, at approximately 6:00 p.m. on July 31, 2012. Def.'s Resp. to Pl.'s Interrog. No. 5. Moore explained she was planning a party for about ten people at nearby Cascade Park, and wanted Soto's assistance obtaining a twelve-pack of beer. Moore Dep. 26:9, June 7, 2013. The party was in honor of Soto's younger brother who had been chosen for the Grimsley varsity soccer team. Moore Dep. 26:10. Defendant agreed to assist and provided the twelve-pack to Moore at her house around 6:30 p.m. Moore Dep. 26:11.

One question that sometimes arises when writing a statement of facts is whether the statement of facts can include inferences drawn from the facts. The answer is a cautious "yes." When writing a persuasive document, courts will usually allow reasonable inferences drawn from the facts. You must, however, take care not to extrapolate facts beyond what is reasonable. Assuming facts in dispute is not a reasonable inference.

#### **D. Conclusion**

In most instances, the conclusion of a trial brief consists of a simple request for the relief the plaintiff seeks. (For that reason, the conclusion is also called the "prayer for relief.") This section is very short, often consisting of only one sentence in which you respectfully request that the court rule in your favor on the issues presented.

#### **Example 19-rr • Conclusion**

For the reasons stated in this brief, Defendant respectfully requests that this Court grant defendant's motion for summary judgment.

## VI. Editing and Polishing Your Brief

Most judges who write about what judges want use three words: edit, edit, edit.<sup>31</sup> Errors and incorrect statements distract from your argument and can even result in prejudice against your client. Edit to get rid of errors, but also to have short, crisp sentences that convey your points succinctly. Your judge reader will appreciate your directness and your attention to detail. To ensure your brief is as error-free as possible, review the techniques that are set out in [Chapter 16, \*Editing and Polishing\*](#), because these techniques apply to all types of legal writing.

Finally, follow the court's rules. Some courts do not like staples, and others require seemingly gigantic fonts; no matter the rule, adhere to what your audience wants. Fudging on margin size, font size, or slipping in a few extra pages *will* be noticed. At best, ignoring the technical rules makes you look sloppy or unprofessional; at worst, disregarding court rules could get your case dismissed.

Also, use the following sample checklist, [Table 19-ss](#), for editing and polishing your trial brief. You may want to use [Table 19-ss](#) in conjunction with the checklist provided in [Chapter 16, \*Editing and Polishing\*](#). [Table 19-ss](#) is meant to be a starting point to ensure your work is complete, understandable, and professional. Ultimately, however, you must create your own checklist. As we stated previously, every writer struggles with different aspects of writing. Examine your writing to determine the particular problems you routinely face and create your own personalized checklist.

### Table 19-ss • Checklist for editing and polishing your brief

#### I. Edit Your Brief

##### A. Review the organization of the Argument section.

###### 1. Review the organization of the multiple claims (if applicable) within the brief.

- ☐ Have you included only your best claims and eliminated unimportant or frivolous claims?
- ☐ Where you have a procedural claim, have you presented the procedural claim first?
- ☐ With substantive claims, wherever possible, have you presented the strongest argument first?

###### 2. Does your roadmap to the Argument section explain the order of the claims that will be addressed?

###### 3. If you have developed a theme that is carried throughout the Argument section, i.e., across claims, does it conform to the facts of your case and the law that governs the case?

##### B. Review each claim within the Argument section.

###### 1. Review the roadmap for a single claim.

- ☐ Does it state your conclusion for that claim?
- ☐ Does it state the governing law for that claim?
- ☐ Does it dispose of any elements or factors that will not be addressed?
- ☐ Does it provide a map to explain the order in which elements or factors will be addressed? If the order in which you will address the remaining elements or factors deviates from the expected order, have you explained that deviation?
- ☐ Does it state your conclusion with respect to those remaining elements or factors?

##### C. Review each argument within a claim.

###### 1. Review the organization of arguments within each claim.

- ☐ Have you organized around the elements or factors that make up the argument?
- ☐ Have you begun each argument with your client's assertion?
- ☐ Within each argument, have you explained the law from your client's perspective?
- ☐ For each element or factor, have you put your strongest argument first?
- ☐ Have you addressed weaknesses in your case from the client's perspective?

###### 2. Check thesis sentences.

- ☐ Review every thesis sentence in your Argument section.

- ☐ Does each thesis advance an assertion in your argument?
- ☐ Is each thesis sentence phrased persuasively?

**3. Check paragraph cohesion.**

- ☐ Compare each thesis sentence to the sentences within the paragraph
- ☐ Does each sentence in the paragraph support the point asserted in the topic sentence?
- ☐ Is the point you want to make in the paragraph emphasized in the thesis sentence and the last sentence of paragraph?
- ☐ Is damaging information strategically placed in the paragraph or minimized by the use of dependent clauses?

**4. Check transitions between arguments.**

- ☐ Wherever two legal arguments abut, check whether you have provided a transition that indicates how the arguments connect.

**5. Repeat step C for each argument within a claim.**

**6. Return to step B if the Argument section addresses more than one claim.**

**D. Review the Introduction.**

1. Does your Introduction contain all topics required in your jurisdiction, e.g., the nature of the case, its procedural posture, and the kind of motion before the court?

**E. Review the Statement of Facts.**

1. Does your Statement of Facts section contain all facts used in your analysis, including negative facts?
2. Have you begun the Statement of Facts with a paragraph that establishes context?
3. Do you use an organizational structure (chronological, topical, perceptual, or a combination) that best tells your client's story?
4. Have you ended the Statement Facts with a sentence that acts as a transition to the next section?
5. Have you included all of the legally significant facts and an appropriate number of background facts and emotional facts?
6. Have you included negative facts but minimized their impact through strategic location, providing less detail and pairing them with favorable facts?
7. Have you appropriately cited to sources (the court or litigation documents) that support your facts?

**F. Review the Conclusion.**

1. Is the Conclusion a short statement that focuses on the relief your client seeks?

**G. Review point headings.**

1. Are the point headings formatted correctly and consistently on each level of the argument (single spaced, with a neat, justified text on the left)?
2. Do the point headings contain the action or conclusion you want the court to adopt and the primary reason the court should take that action or adopt the conclusion?
3. Do the sub-headings provide the reader with an overview of the legal and factual support for the point heading's conclusion?
4. Do the sub-headings work together to present an outline of the argument?

**II. Polish Your Brief**

**A. Strengthen your sentences.**

**1. Find and revise long sentences.**

- ☐ Revise any sentences longer than 3 lines.
- ☐ Revise any sentence that has more than one main idea.

**2. Review sentences to ensure the most important information is in a point of emphasis.**

**3. Create clear subject-verb pairs.**

- ☐ Bring subject and verb close together.
- ☐ Minimize passive voice. Use it only for strategic purposes.

## B. Proofread your work.

1. Use a colored piece of paper to read line-by-line.
2. Read your paper aloud.

## C. Check your citations.

1. Check that each citation conforms to the appropriate format for your jurisdiction and law office.
2. Check for a full cite for each legal authority the first time it is relied on and check that every subsequent mention of that authority is a short citation.
3. Use a citation manual to check citation content.
4. Check pinpoint cites.
  - ☐ Check that each case citation has a pinpoint cite.
  - ☐ Check that each pinpoint cite references the correct page.
  - ☐ Check each “*Id.*” to ensure it correctly refers to the same authority and page referenced in the citation immediately before it.

## D. Check your format.

1. Does your paper meet the jurisdiction’s rules for font size, margins, pagination, and spacing?
2. Have you adhered to the jurisdiction’s page limit?
3. Have you included the proper caption on the document with the names of the parties, county, and court spelled correctly?
4. Have you correctly labeled each section of the brief including the Introduction, Statement of Facts, Argument, and Conclusion?
5. Have you signed the brief and included a Certificate of Service according to your jurisdiction’s requirements?

<sup>1</sup> The Honorable Mark P. Painter, *Appellate Practice—Including Legal Writing from a Judge’s Perspective*, 2 (originally printed in *Ohio Trial*, Aug. 1996), and revised May 1, 2000.

<sup>2</sup> You may, of course, write persuasive documents for other entities such as an administrative law judge, arbitrator or arbitration boards, or a mediator. For ease of discussion, however, this chapter focuses on writing generally to a court and, in particular, to a trial court.

<sup>3</sup> While many attorneys develop their theme at the outset of the brief writing process and continue to refine their theme as their arguments develop, others wait until they have developed the arguments and then see if the developed arguments present a unifying theme. You should use whatever method works best for you.

<sup>4</sup> Fed. R. Civ. P. 56(a) (2010).

<sup>5</sup> Fed. R. Crim. P. 29 (2010).

<sup>6</sup> *United States v. Augustine*, 663 F.3d 367, 373 (8th Cir. 2011).

<sup>7</sup> 192 F. Supp. 2d 1077 (D. Or. 2002), *aff’d*, 368 F.3d 118 (9th Cir. 2004), *aff’d*, *Gonzales v. Oregon*, 543 U.S. 1145 (2005).

<sup>8</sup> Examples 19-F and 19-G are based on Brief for Appellants and Appellee’s Brief of the State of Oregon (respectively) in *Oregon v. Ashcroft*, 368 F.3d 118 (9th Cir. 2004).

<sup>9</sup> 66 Fed. Reg. 56,607, 56,608 (Nov. 9 2001).

<sup>10</sup> 21 C.F.R. §1306.04 (2005).

<sup>11</sup> *Id.* at §801.

<sup>12</sup> *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985)).

<sup>13</sup> The doctrine that bars parties from raising a new claim in future litigation if that claim could have been raised in earlier litigation is called *res judicata*. See generally 47 Am. Jur. 2d *Judgments* §463-72 (2013).

<sup>14</sup> 34 C.F.R. §106.41.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Fed. R. Civ. P. 56(a).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> This example is based on arguments presented in *Menagh v. Breitman*, No. 107856/09 (N.Y. Sup. Ct. Oct. 15, 2010).

<sup>21</sup> Note that some legal arguments will have no case illustrations, e.g., pure rule-based arguments or statutory construction arguments. See [Chapters 8-11](#), *Applying the Law: Rule-Based Reasoning* and [Chapter 11](#), *Statutory Analysis*.

<sup>22</sup> The format and font requirements for point headings may vary according to your jurisdiction or the customs of your office.

<sup>23</sup> The examples in 19-T, U, V, and ff were adapted from class materials prepared by Professor John Korzen, Wake Forest University School of Law.

<sup>24</sup> As we noted in [Chapter 16](#), *Editing and Polishing*, passive voice is different from past tense. “Past tense” refers to *when* certain actions took place—now or in the past. Passive voice refers to *who* did the action.

<sup>25</sup> <http://grammar.ccc.commnet.edu/grammar/passive.htm> (2013).

<sup>26</sup> Check your jurisdiction’s local rules or talk with colleagues to determine the local custom.

<sup>27</sup> Again, the order of the sections may be determined by the rules of your jurisdiction or the customs of your office.

<sup>28</sup> Mary Beth Beazley, *A Practical Guide to Appellate Advocacy* 122 (3d ed., Aspen Pub. 2010).

<sup>29</sup> *Id.* at 122-23.

[30.](#) The format for citations to the record may vary according to your jurisdiction. Both the ALWD Manual and the Bluebook describe how to cite to court documents, transcripts, and the record. Make sure to consult your local rules and Rule 12.19 of the ALWD Manual or Rule 10.8.3 of the Bluebook.

[31.](#) Painter, *supra* note 1, at 7 (“Edit, edit, edit, and edit again. Typos, bad grammar, and misplaced paragraphs (which were not such a problem before computers) simply take away from your argument. Remember—the only time you have the full attention of [the judge] is when the judge is reading your brief.”).

## Appendix A

### Effective Memo: Adverse Possession

#### MEMORANDUM\*

**TO:** Jamie Koenig, Partner  
**FROM:** Allison Handler, Associate  
**DATE:** November 17, 2008  
**SUBJECT:** Neros' Adverse Possession Claim; 08-467A

#### QUESTION PRESENTED

Between 1979 and 1989 Linda and Tom Nero planted and maintained a vegetable garden, built a fence enclosing the garden, and cared for an apple orchard on a piece of property they believed to be theirs. Under Oregon common law regarding adverse possession, can the Neros acquire the disputed property from the actual owners?

The Question Presented opens the memo and provides context for the reader by describing the legal question, the facts on which the legal question turns, and the law that will control. (Ch. 13)

#### SHORT ANSWER

Most likely, yes. To prove adverse possession, Oregon common law requires that the plaintiffs, the Neros, show through clear and convincing evidence that they had actual, open and notorious, exclusive, hostile, and continuous possession of the disputed property for ten years. Because they built a fence and maintained the fence, a garden, and an orchard, the Neros should be able to prove each element through clear and convincing evidence. Therefore, they should be able to acquire the disputed property through adverse possession.

The Short Answer provides a clear, concise answer to the question and describes the fundamental reasons for the answer. (Ch. 13)

#### STATEMENT OF FACTS

The first paragraph of the Statement of Facts provides context by introducing the main players and their problem. (Ch. 14)

Our clients, Linda and Tom Nero, purchased property in semi-rural Oregon in 1978. The Neros recently learned that a garden and apple orchard they had always believed to belong to them, in fact, belongs to their neighbors, Ms. Welch and Mr. Bruce. The Neros would like to claim the garden and apple orchard as their own.

This Statement of Facts is organized topically and chronologically. The first topic is the Neros' activities. The second topic is the activities of the actual owners. Within each topic, however, the facts are organized chronologically. (Ch. 14)

Before their purchase, the real estate agent toured the property with the Neros and delineated the property lines to them. The Neros' undisputed property lines are the ranch fence to the north, the road to the east, and the brook to the south. According to Mrs. Nero, she and her husband believed that the western boundary ran in a straight line from the turn in the ranch fence to the brook and that their property included the apple orchard. The apple orchard is on the southern end of the Neros' property and runs along the brook from the road to the purported property line. The Neros do not have a copy of the deed and did not survey the land before they bought it.

A Statement of Facts may include important facts that are unknown. (Ch. 14)

In 1979, the Neros began pruning the apple trees in the entire orchard. Late that spring, they cleared an area 60 feet wide by 100 feet long in the northwest corner of the property. The area was bordered by the ranch fence on the north and by the vacant lot, then still owned by Dot Cramer, on the west. In the area that they cleared, the Neros planted a vegetable garden and built a two-foot-high fence made of chicken wire to protect the garden from rabbits. The garden and fence were visible from the vacant lot.

During most years since 1979, the Neros planted the garden during the growing season. In 1986, Mr. Nero suffered a stroke, and although the Neros began tilling, they did not plant the garden. That year, they also hired a woman to care for the apple trees. From 1990 through 1993, Mr. Nero fell ill again, and they were unable to plant the garden. During this period, the Neros also took out the fence and did not prune the apple trees. Every year that the Neros had the garden, they harvested vegetables and fruits often grown in semi-rural Oregon. Neighborhood children helped the Neros' children weed and water the garden. The Neros permitted their neighbors to pick vegetables from the garden and take them home. In the winter months, the Neros allowed the garden to go fallow.

Here, the Statement of Facts examines a second topic, the activities of the actual owners. Within this second topic, the facts are, again, organized chronologically. (Ch. 14)

Since 1978, Ms. Cramer has lived in Wisconsin and has not visited Oregon. Recently, she sold the vacant lot to Jennifer Welch and James Bruce, both of whom are lawyers. Last week, Mrs. Nero noticed orange survey stakes in the garden and in the orchard. The survey stakes are 55 feet east of the purported property line that the Neros have observed for the last thirty years. Mrs. Nero contacted the new owners of the western lot, and they informed her that they had conducted a survey of the property and boundaries to qualify for a construction loan. The Neros were shocked to learn that the garden and apple orchard that they had always believed to be theirs was not theirs. In our interview with the Neros, Mrs. Nero exclaimed, "That's part of our land!"

The last sentence describes the procedural posture of the clients' case and provides a transition to the Discussion section. (Ch. 14)

The Neros have asked the firm to examine whether they can gain legal title to the garden and the apple orchard.

## DISCUSSION

The Discussion section opens with an introduction that maps the legal analysis ahead. (Ch. 12)

This introduction describes the general rule that governs a claim for adverse possession. By describing the general rule, the writer also alerts the reader to the elements that will be addressed in the remaining discussion. (Ch. 12)

The Neros will very likely be able to gain ownership of the disputed property, including the apple orchard and vegetable garden, through adverse possession. To acquire property by adverse possession plaintiffs must prove by clear and convincing evidence that their possession of the land was actual, open and notorious, exclusive, hostile, and continuous for a ten-year period. *Hoffman v. Freeman Land and Timber, LLC*, 994 P.2d 106, 109 (Or. 1999). Oregon Revised Statute §105.620 (2007), prescribes these same elements of adverse possession, but also requires that the land be possessed through an honest belief that the plaintiffs owned the land. The statute applies only to claims that vested and are filed after January 1, 1990. *Mid-Valley Resources, Inc. v. Engelson*, 13 P.3d 118, 121 n.2 (Or. Ct. App. 2000). The Neros should be able to prove that their claim vested by the late spring of 1989; consequently, their claim is not subject to Oregon Revised Statute §105.620, and a review of their potential claim should analyze only those activities on the disputed land that occurred from 1979 through 1989. The element that will be most difficult for the Neros to prove is that their possession was open and notorious; however, they should be able to prove that element and the other common law elements of adverse possession and, therefore, gain ownership of the disputed property.

Because this introduction is long, the writer restates the conclusion at the end. Restating the conclusion reminds the reader where the argument is headed. (Ch. 12)

### **A. The Neros actually possessed the land because they used the land as an owner would by maintaining a fence and harvesting fruit trees.**

In this memorandum, point headings separate the arguments about each element. (Ch. 12)

The first element, actual possession, is addressed with one legal argument. One legal argument includes a conclusion, an explanation of the law, an application of the law to the client's facts and a final conclusion. (Ch. 6)

Here, the initial conclusion and explanation of the law are in the first paragraph, and the application and the final conclusion are in the next paragraph.

First, Mr. and Mrs. Nero can most likely prove actual possession. Plaintiffs can establish actual possession by showing that they used the land as an owner would use that particular type of land. *Zambrotto v. Superior Lumber Co.*, 4 P.3d 62, 65 (Or. Ct. App. 2000). Courts focus on the type of use for which the land is suited and do not necessarily focus on the amount of activity. *Id.* Plaintiffs in past cases have shown that they used the disputed land as an owner would in a variety of ways. *See, e.g., Davis v. Park*, 898 P.2d 804, 806-07 (Or. Ct. App. 1995);

*Slak v. Porter*, 875 P.2d 515, 518 (Or. Ct. App. 1994). In *Davis*, the plaintiffs established that they used the disputed property as an owner would by showing that they used the disputed property as they did their adjoining land. 898 P.2d at 806-07. In *Slak*, the plaintiffs built a fence and planted vegetation and, in that way, proved actual possession. 875 P.2d at 518.

Mr. and Mrs. Nero should be able to prove that they had actual possession of their land because they used the disputed property in a manner that an owner would. Like the landowners in *Davis*, the Neros used the disputed land exactly as they did their adjacent land: In both parcels of land, they planted and maintained a garden and fruit trees. In addition, like the plaintiffs in *Slak* who showed actual possession by building a fence and planting vegetation, the Neros built a fence and planted vegetation in their garden and orchard. The Neros should, therefore, be able to prove that they actually possessed the disputed land.

## **B. The Neros' possession was open and notorious because they built a fence and used the land extensively and openly.**

The next element addressed is “open and notorious.” It is a more complicated argument because open and notorious possession can be proved in two ways. The first paragraph is a mini-roadmap that describes the two ways, eliminates one of the two as unavailable to the clients, and transitions into the argument that is open to them. (Ch. 12)

After proving actual possession, the Neros will have to demonstrate that their possession of the land was open and notorious. To prove that their possession was open and notorious, the plaintiffs must prove that the owners had notice that they were asserting title to the disputed property. *Slak*, 875 P.2d at 518-19. The notice may be actual or constructive. *Id.* at 519. Owners have actual notice when they are aware that their claim of the land is being challenged. *Id.* Because Ms. Cramer was unaware that the Neros were asserting a claim to the disputed land, she did not have actual notice. Instead, the Neros must prove that they gave constructive notice of their possession.

The discussion about the “open and notorious” element has now been reduced to one legal argument—whether plaintiffs gave constructive notice of their possession. In the discussion about constructive notice, you can again see the essential components of a legal argument.

The argument begins with a conclusion and an explanation of the law in one paragraph.

The application and final conclusion are included in the next two paragraphs.

The Neros can probably establish constructive notice because they built a fence on the purported boundary and used the land extensively and openly. A plaintiff provides constructive notice of a claim when the plaintiff's use of the property would give the owner knowledge of the use and claim. *Hoffman*, 994 P.2d at 110. Intermittent use of the land may suffice if that use is sufficient to give notice. *Id.* In *Hoffman*, occasional livestock grazing and maintaining a fence were enough activity to establish constructive notice. *Id.* at 111-12. The use does not have to be visible from the owner's land to give the owner constructive notice. *Davis*, 898 P.2d at 807. For example, in *Davis*, the plaintiffs built a fence. *Id.* The court held that the fence gave constructive notice even though the fence was not visible from the owners' land because the plaintiffs and neighbors respected it as the boundary line. *Id.*; see also *Slak*, 875 P.2d at 519 (constructing a fence was the “classic example” of open and notorious use).

The Neros can likely show constructive notice to Ms. Cramer because they used the property in more than an intermittent manner. If, as in *Hoffman*, occasional use and maintaining a fence is sufficient to show constructive notice, then the Neros can show constructive notice because they built a fence and worked the land heavily during the growing season. In addition, the Neros' fence was always visible from the western lot, even when they allowed the garden to return to its natural state. In fact, the Neros' fence was the property line respected by the Neros and all of their neighbors. Because the non-visible fence in *Davis* provided constructive notice, the Neros' visible fence should provide notice, too. Accordingly, they can prove they used the property as an owner would and that their use was exclusive.

In this argument, the application includes a counter-analysis, which describes the argument the neighbors “might try to” make. (§8.3)

The counter analysis is effective because it fully explains the argument that might be made, then explains why that argument is ultimately weaker, and then returns to the conclusion that is most likely to prevail.

Jennifer Welch and James Bruce, the current owners, might try to argue that the fence did not give constructive notice. One court failed to find constructive notice from an irregularly maintained fence that marked a portion of a purported property line; no evidence was offered to identify who built the fence. See *Zambrotto*, 4 P.3d at 64, 66. In another case, a fence was not sufficient notice because there were no “no-trespassing” signs or other indicators that the fence marked the property line. *Rayburn v. Coffelt*, 957 P.2d 580, 583 (Or. Ct. App. 1998). Ms.



Welch and Mr. Bruce may argue that because the Neros' fence covered only part of the disputed property line and did not have a "no-trespassing" sign posted on it, the fence did not give constructive notice.

Notice that this counter-analysis is based on additional law. Although attorneys prefer to describe all the relevant law in the initial explanation of the law, sometimes an attorney will wait to describe the law that would support a counter-analysis. Here, the attorney waited. Likely, the attorney decided that the explanation of the law was sufficiently complicated and so it was better to delay explaining the law rather than risk overloading the reader.

Distinguishable from *Zambrotto*, the Neros can prove through testimony that they built and maintained their fence. Moreover, their fence was even with the western edge of the orchard and these two landmarks provided a clear boundary line. Unlike the *Rayburn* case, the Neros can point to their active cultivation of the land and their neighbors' knowledge of their activity, in addition to the fence, to prove that Ms. Cramer had constructive notice of their claim. To summarize, the Neros can likely prove they possessed the disputed property openly and notoriously because they built the fence, planted the garden, and cared for the orchard. Furthermore, their neighbors were aware of all these activities.

### **C. The Neros' possession of the property was exclusive because they allowed access in the same manner that an owner would.**

Even a very short, one paragraph legal argument has the same components: a conclusion, an explanation of the law, an application, and a final conclusion. (Ch. 6)

Next, the Neros will be able to prove that their possession of the property was exclusive. To prove exclusivity, plaintiffs need prove only that they used the land as an owner would use the land. *Hoffman*, 994 P.2d at 110. "Actual physical exclusion" of all other people is not required; plaintiffs must merely prove "use consistent with ownership." *Slak*, 875 P.2d at 519. The Neros can easily prove that they used the property exclusively. Although the Neros permitted neighbors to harvest and keep some of the garden's vegetables, exercising the right to grant neighbors permission to take some of the vegetables shows use characteristic of an owner, which shows exclusive possession. Additionally, as discussed above, the Neros kept a garden, maintained an orchard, and built a fence, just as landowners in semi-rural Oregon often do.

### **D. The Neros can prove hostility under a theory of pure mistake or by their subjective intent to own the land.**

This more complicated legal argument, which has two alternative analyses, is introduced with an issue statement. (Ch. 9)

Fourth, the Neros must establish that their use of the disputed property was hostile. To prove hostility, the plaintiffs must have used the disputed land intending to occupy the land as its true owners and not in subordination to the true owner. *Faulconer v. Williams*, 964 P.2d 246, 251 (Or. 1998). Plaintiffs can prove hostility in two ways. *Hoffman*, 994 P.2d at 110. Plaintiffs can establish that "possession was under an honest but mistaken belief of ownership." *Id.* at 110 n.4. This is the "pure mistake" doctrine. *Id.* Alternatively, plaintiffs can establish that, subjectively, they intended to deprive the owners of ownership. *Id.* at 110.

To help the reader follow the argument, the writer has provided point headings that lead the reader through the argument. (Ch. 12)

#### **1. The Neros can prove pure mistake because they believed their realtor's mistaken statements about the property line.**

The Neros will very likely be able to prove hostility through "pure mistake" because they honestly believed they owned the disputed property. *Hoffman*, 994 P.2d at 110 n.4. A pure mistaken belief is one without conscious doubt. *Faulconer*, 964 P.2d at 252. If plaintiffs are aware that they may not own the disputed land, conscious doubt exists, and the plaintiffs cannot prove hostility by "pure mistake." *Id.* In *Davis*, the plaintiffs proved pure mistake by establishing that they had walked the fence line before buying the land, and as a result, had honestly and reasonably believed the fence line to be the property boundary. *Davis*, 898 P.2d at 805, 806. However, a plaintiff who thought the land was "all ours" but "did not know" whether the fence was actually the boundary was not able to rely on the pure mistake doctrine to prove her possession was hostile to the owner's claim. *Mid-Valley Resources*, 13 P.3d at 122.

The Neros will be able to prove that they honestly believed that they owned the disputed property and, therefore, that their use was hostile. The Neros, like the plaintiffs in *Davis*, toured the property before making the purchase and believed from the statements of their realtor that the property line was different from where it actually was. The Neros also did not have any

doubts regarding their belief, unlike the plaintiff who testified in *Mid-Valley Resources*. In explaining her problem, Mrs. Nero exclaimed, “That’s part of our land!” She seemed convinced that the disputed property belongs to her and her husband. The Neros made a reasonable and honest mistake regarding the boundary line; therefore, the Neros should be able to prove that, by pure mistake, their possession of the land was hostile.

## 2. The Neros can also prove they subjectively believed the land was theirs.

Effective case illustrations are detailed about the facts that triggered the court’s decision and the court’s reasoning. (§7.2)

In the *Slak* case the trigger facts are that the plaintiffs constructed a fence and planted hedges, shrubs, and other plants. The writer does not identify any additional reasoning because the court in *Slak* did not do so.

In *Hoffman* the trigger facts were that the plaintiffs maintained but did not construct a fence, grazed cattle, thinned timber and posted a “no-trespassing” sign. This case illustration does explain the court’s reasoning, as the court did in the case.

In the alternative, if Ms. Welch and Mr. Bruce find a neighbor to testify that the Neros had any doubt during the ten-year period, then the Neros would have to prove hostility through their subjective intent to own the land. See *Hoffman*, 994 P.2d at 110 (explaining subjective intent). To prove hostility without pure mistake requires the plaintiffs to demonstrate a subjective intent to own the property without any subservience to the true owners. *Faulconer*, 994 P.2d at 251. In *Slak*, the plaintiffs proved their subjective intent to own the property by constructing a fence and planting hedges, shrubs, and other plants on the disputed property. 875 P.2d at 520. By contrast, in *Hoffman*, even though the plaintiffs maintained an existing fence, grazed cattle, thinned timber, and posted “no-trespassing” signs, the court determined that the plaintiff did not establish his subjective intent to dispossess the owner of his land. 994 P.2d at 112. The court reasoned that the plaintiffs’ activities on the land were activities of mere “convenience” rather than ownership. *Id.* In particular, the court noted that the plaintiffs did not construct the fence and did not use it to establish the property line. *Id.* Rather, the fence was built simply as a “convenience,” to corral cattle. As a result, plaintiffs’ activities in *Hoffman* were not sufficient evidence of hostility. *Id.*

An effective case comparison is carefully structured to draw out the similarity or the distinction between the client’s case and a prior case. (§7.2)

Here, the writer uses parallel structure to help the reader see the similarity between *Slak* and the client’s case.

Then, the writer uses parallel structure again to help the reader see where the client’s case is distinguishable from the *Hoffman* case.

The Neros’ hostile use of the land is more similar to the plaintiffs’ use of the land in *Slak* than in *Hoffman*, and thus shows their subjective intent to own the land. Like the plaintiffs in *Slak* who proved hostility by building a fence and planting vegetation, the Neros also built a fence and planted a garden. The Neros’ claim is distinguishable from the claim in *Hoffman*. Where the plaintiffs in *Hoffman* could not prove hostility because they had not built the fence and the fence did not run along the border of their property, the Neros built their fence, and they built it along the northwest border of their property. Building the fence on the property border shows the Neros’ subjective intent to possess the land by establishing a clear property boundary.

Ms. Welch and Mr. Bruce might argue that the Neros’ activity was insufficient to prove hostility. They will argue that if the activity in *Hoffman*, maintaining a fence, grazing cattle, thinning the timber and posting a “no trespassing” sign, was insufficient then the Neros’ use should not be considered hostile; however, the Neros’ activities on the disputed land were more than activities of convenience, as were those in the *Hoffman* case. The Neros actively used the land to grow a garden and apple trees, understanding that the land was their land. Thus, the Neros can likely show hostility through either pure mistake or subjective intent.

## **E. The Neros held the land continuously for ten years.**

In an effective memo, the topic sentences of each paragraph lead the reader through the argument. (Ch. 16)

Return to the top of the Discussion section and read just the topic sentences of each paragraph to see how the topic sentences guide the reader through the argument.

Finally, the Neros must prove that they possessed the land continuously. Oregon Revised Statutes §12.050 requires the plaintiffs to prove continuous adverse possession for a ten-year period. Seasonal use may be “continuous.” *Hoffman*, 994 P.2d at 110. In *Hoffman*, cattle grazing established continuous use because the grazing was “continuous use during the pasturing season.” *Id.* Similarly, use may be continuous even if the plaintiff takes a “sabbatical.” *Slak*, 875 P.2d at 519-20. In *Slak*, the court determined that the existence of a

fence and vegetation on an easement over a ten-year period proved continuous possession, even though the plaintiffs may have taken sabbaticals that interrupted the ten-year period. *Id.* The court explained that whether the plaintiffs took a sabbatical was “of no consequence” to the continuity of their possession because the fence and vegetation had remained. *Id.*

The Neros can prove continuous use relying on both *Hoffman* and *Slak*. The seasonal use of land for livestock grazing is fundamentally similar to the Neros’ seasonal use of land to keep a vegetable garden. Any argument that the Neros cannot prove ten continuous years of possession on the disputed property because the Neros did not plant the garden in 1986 or from 1990 to 1993 should fail. Like the plaintiffs in *Slak*, the Neros maintained a fence and cared for the orchard each year from 1979 to the present, even though they did not plant the garden every single year. Thus, the Neros’ choice not to plant the garden in a few years is not detrimental to their claim because the fence and orchard are further evidence of continuous possession.

The Conclusion begins by repeating the answer to the client’s overall question. This conclusion then turns to practical considerations and advises how the client ought to proceed in light of the legal analysis and the realities of litigation. (Ch. 15)

## CONCLUSION

The Neros have a strong claim that, under Oregon common law, they gained title to the disputed land by adverse possession. Though the Neros will likely win if they file suit, they may want to consider alternatives to filing suit, since litigation is always a gamble and usually time consuming. Ms. Welch and Mr. Bruce may be eager to sell the disputed property at below market value rather than face litigation since a claim against the property may stall the pending construction loan. As lawyers, Ms. Welch and Mr. Bruce are likely to recognize the strength of the Neros’ claim to the land. If they refuse the Neros’ offer to buy the land, the Neros should first suggest mediation before filing suit.

\* This memorandum is based on a fact pattern created by Diana Pratt, formerly of Wayne State University Law School.

## Appendix B

### Effective Memo: Intentional Infliction of Emotional Distress

#### **MEMORANDUM\***

To: Carla Izaguirre

From: Barry Davidson

Date: January 10, 2013

Re: Ethan McLaughlin's claim for intentional infliction of emotional distress; Client matter 2275-09924

#### **Question Presented**

Under North Carolina's common law, which prohibits intentional infliction of emotional distress, does a businessman recover for emotional distress when a former relative posts to the Internet accusations of sexual and financial misconduct, causing the businessman to lose an important client and seek psychiatric treatment?

In this Question Presented, the writer uses the under/does/when format to establish the jurisdiction, legal question, controlling rule of law, and key facts in this case. (Ch. 13)

#### **Brief Answer**

Most likely, yes. Under North Carolina common law, the tort of intentional infliction of emotional distress includes three elements: (1) the defendant's extreme and outrageous conduct (2) that is intended to and (3) does cause the plaintiff severe emotional distress. A jury can find extreme and outrageous conduct because Dixon repeatedly, and seemingly without any foundation, publicly portrayed our client as a sexual predator, adulterer, tax evader, and dead-beat dad. These same facts will likely show the requisite intent to harm McLaughlin. Finally, medical documentation of McLaughlin's treatment for emotional problems following the postings will satisfy the third element of severe emotional distress.

In this Brief Answer, the writer sets out the rule of law—the elements of the claim—and briefly gives a reason why each element is met. (Ch. 13)

#### **Facts**

The introductory paragraph in the Statement of Facts names the players in the action and gets to the crux of the controversy. (Ch. 14)

Our client, Ethan McLaughlin, is seeking recovery for emotional damages after Sharon Dixon, his former sister-in-law, posted allegations of sexual and financial misconduct on her website.

McLaughlin is the co-owner of a marketing firm that works with clients in high-tech industries. Dixon maintains a website dedicated to sharing her sexual exploits. She generally uses pseudonyms when referring to family on her site; however, in a posting that discussed the family's negative response to her lifestyle, Dixon mentioned McLaughlin and his son by name. Soon thereafter, an important business client contacted McLaughlin with concerns about his connection to the site.

This Statement of Facts is organized chronologically; however, individual paragraphs identify distinct ideas within the chronology. For example, the writer creates a separate paragraph for each posting, the responses following each posting, and McLaughlin's conversation with the attorneys about the factual foundation for the postings. (Ch. 14)

McLaughlin then sent an e-mail to Dixon that requested she remove references to his son from her site. Dixon complied with the request. She then, however, posted a second entry. That entry asserted that McLaughlin had sex with her 15 years earlier when Dixon was a minor, that he made sexual advances towards both Dixon and another sister, that he "cheated on his ex-wife Sue" (Dixon's other sister), and that he failed to pay back taxes and child support. The posting also included McLaughlin's home address and e-mail address. Dixon urged those reading the posting to "let him know how you feel about what he's done."

This Statement of Facts is effective because it describes critical facts in detail. For example, review the description of the second entry on Dixon's website. Now suppose the writer had simply stated "Dixon posted derogatory information on her website about McLaughlin's relationships with her, his wife, and a sister." Such a description would leave the reader wondering "what kind of derogatory information?" and would not be sufficiently detailed to support the legal analysis below. (Ch. 14).

On the morning after Dixon posted the second entry, McLaughlin began receiving harassing e-mails and phone calls expressing outrage at his purported actions. That night, a brick with a death threat attached was thrown through his living room window, and McLaughlin began suffering from insomnia and loss of appetite. He also missed work and feared losing the client who was aware of the site.

McLaughlin then sent another e-mail to Dixon asking her to please remove the postings. He described the harassment and his insomnia. He also mentioned he risked losing a client because of her postings.

In response, Dixon posted a third entry accusing McLaughlin of attempting to bribe her and characterizing him as "a potentially violent ... and mentally unstable monster." After this third posting, he continued to receive harassing phone calls and e-mails. He calculates he has received over one hundred such e-mails and phone calls. He also lost the major business account.

Two weeks after the final posting, McLaughlin began seeing a psychiatrist. McLaughlin now requires daily therapy and anti-depressant medications. He has amassed almost five thousand dollars in doctor's bills and medication costs. (Copies of his medical bills are included in his file.) He reports that his insomnia and loss of appetite persist, and he is embarrassed by his ongoing need for psychiatric treatment.

McLaughlin tells us that the postings have little factual basis. He says that he never made any advances on Dixon or the sister; that he was never physically intimate with either; that he never cheated on his ex-wife; and that, although he was once late in paying his taxes and his child support, he has now paid both in full. McLaughlin believes that Dixon "had a crush on him" when they were younger and that she is still angry that he did not reciprocate her feelings.

The last paragraph of the Statement of Facts establishes the procedural posture and transitions into the substantive issues of the memo. (Ch. 14)

McLaughlin now wants to know if he can bring a successful claim against Dixon for damages to his business and to his mental health.

### **Discussion**

McLaughlin can most likely bring a successful claim against Dixon for intentional infliction of emotion distress. To support a claim of intentional infliction of emotional distress, a plaintiff must prove the following elements: "(1) extreme and outrageous conduct, (2) which is intended to cause severe emotional distress, and (3) does cause severe emotional distress." Woodruff v. Miller, 307 S.E.2d 176, 178 (N.C. Ct. App. 1983) (citing Dickens v. Puryear, 276 S.E.2d 325, 335 (N.C. 1981)). Mr. McLaughlin can prove each element of the claim.

The roadmap paragraph is concise. It simply sets out the overall conclusion, the governing rule, and then the bottom-line conclusion for the whole case. Notice that the governing rule does triple-duty: It states the governing rule, identifies the elements in the governing rule, and indicates the order in which the elements will be discussed. No additional background information is necessary. (Ch. 12)

#### **A. Dixon's public accusations that McLaughlin engaged in sexual misconduct and failed to pay taxes and child support constitute extreme and outrageous conduct.**

Notice how the writer uses "working" headings—each heading states the element and the ultimate legal conclusion of the section that follows. (Ch. 12)

The writer's first argument begins here when she states her bottom-line conclusion. (Ch. 9)

A jury could find Dixon's conduct to be extreme and outrageous. To be considered extreme and outrageous, conduct must "go beyond all possible bounds of decency, and [be] regarded as atrocious, and utterly intolerable in a civilized community." Briggs v. Rosenthal, 327 S.E.2d 308, 311 (N.C. Ct. App. 1985) (citing Restatement (Second) of Torts §46 cmt. h (1965)). "Mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities" are insufficient. Id. A court determines, in the first instance, whether the evidence could establish extreme and outrageous conduct. Hogan v. Forsyth Country Club Co., 340 S.E.2d 116, 121 (N.C. Ct. App. 1986). A jury, however, decides whether the conduct was in fact extreme and outrageous. Id.

The explanation of the law sets out the general rules for the element before going into more specific rules in the second paragraph. (§7.1)

In making the initial determination about the sufficiency of the evidence, a court will consider many factors, including the following: the offensiveness of the conduct, the persistence of the conduct, the defendant's purpose in acting, and the foreseeability of injury to the plaintiff. West v. King's Dept. Store, Inc., 365 S.E.2d 621, 625 (N.C. 1988) (offensiveness, persistence, and foreseeability); Briggs v. Rosenthal, 327 S.E.2d 308, 311-12 (N.C. App. 1985) (offensiveness, purpose, and foreseeability); Woodruff v. Miller, 307 S.E.2d at 178 (offensiveness, purpose, and persistence).

The explanation of the law continues with three case illustrations: Woodruff, West, and Briggs.

These case illustrations are lengthy enough that each merits its own paragraph.

Notice that each case illustration starts with a hook, which tells the reader the main point the case will illustrate. (§7.2)

When a defendant persistently distributes derogatory information for no purpose other than spite, the evidence is sufficient to establish extreme and outrageous conduct. Woodruff, 307 S.E.2d at 178. In Woodruff, the plaintiff was the superintendent of the local school system. Id. at 177. Thirty-years ago, he had participated in a college prank and been arrested. Id. The defendant, after losing two recent lawsuits to the superintendent, posted copies of the superintendent's thirty-year old arrest record on the "Wanted" board at the local post office and on bulletin boards at the local high school. Id. The defendant also showed the "Wanted" poster to at least one prominent citizen in the community. Id. A jury found that the defendant had intentionally inflicted emotional distress on the superintendent. Id. In upholding the jury decision, the Woodruff court explained that distributing derogatory information as part of a "calculated, persistent plan to disturb, humiliate, harass and ruin the plaintiff for no other purpose but defendant's own spiteful satisfaction" was extreme and outrageous conduct. Id. at 178.

Likewise, an unrelenting, unwarranted, public attack is also sufficient to establish extreme and outrageous conduct, especially when the defendant is warned that the attack is likely to cause injury. West, 365 S.E.2d at 625-26. In West, a store manager accused plaintiffs, a husband and wife, of stealing merchandise. Id. at 622-23. His accusations continued in public, for over seventy-five minutes, even though the husband and wife explained that they had bought the merchandise; presented a receipt for the merchandise; and found the cashier, who acknowledged selling the merchandise to them. Id. at 623. During much of this time, the store manager knew that the wife had recently been hospitalized and, according to her husband, "could not handle the aggravation and anxiety" of the accusations. Id. The court held that the "unrelenting attack, in the face of explanation," was sufficient to establish extreme and outrageous conduct. Id. at 625. In reaching its conclusion, the court particularly noted that the store manager continued his attacks even after being warned about the wife's delicate health. Id. at 625.

Here, the writer had a choice about whether to include a second case illustration that shows what constitutes extreme and outrageous conduct. Although the second case is similar to Woodruff, described above, it draws out the effect of a warning, which the first case does not. Because it brings out additional information, the writer made a reasonable choice to include the second case illustration.

Notice how the writer illustrates the parameter of the rule, using two cases to show when extreme and outrageous conduct is present, and one case to show when it is not.

Conversely, unflattering information published to provide an "honest, sincere and sensitive portrait" of a person is not extreme and outrageous conduct. Briggs, 327 S.E.2d at 312. In Briggs, the plaintiffs were parents whose son had recently died. They sued the defendants, a journalist and a newspaper publisher, after the newspaper published an article about their recently deceased son. Id. at 309. The article described the son's drinking and anti-social behavior but, also, described the son as an "immensely substantial person, as fine, as dignified ... as important as any solid citizen I ever met." Id. The Briggs court found that the article, although offensive to the parents, was "honest, sincere and sensitive." Id. at 312. The court then upheld the lower court's decision to dismiss the case. Id.

Notice that the client is never mentioned in the explanation of the law.

The application begins here when the writer turns to the client's case. (Ch. 8)

In this case, a jury could find that Dixon's conduct was extreme and outrageous. McLaughlin can present as strong a case as the plaintiff did in Woodruff. [1] To begin, Dixon's accusations were as derogatory as those in Woodruff. Accusing a person of sexual misdeeds, adultery, tax evasion, failure to pay child support, and being a "potentially violent" and "mentally unstable monster" is likely more offensive than disseminating a 30-year old arrest record that arose out of a college prank. [2] Moreover, Dixon's attacks were just as persistent as the attacks in Woodruff. The defendant in Woodruff, made his attack repeatedly available to



the public by posting his “Wanted” poster in the post office and local high school and showing it to a local citizen. Similarly, Dixon made her three attacks repeatedly available to the public by posting them all to the Internet and refusing to remove them. [3] Finally, if they are in fact baseless, her accusations seem to have “no other purpose but ... spiteful satisfaction.” Because in Woodruff a jury found, and a court approved the finding, that the defendant’s conduct was extreme and outrageous, a jury could also properly find that Dixon’s conduct was extreme and outrageous.

The comparison to Woodruff is complex. It requires three factual comparisons, labeled 1, 2 and 3. Notice that an “overt statement” of why the client’s case is like the prior case begins the first two comparisons. That overt statement is then supported by specific facts. (§8.2)

After establishing the factual similarities to the prior case, the writer explains the legal significance of the similarities. (§8.2)

Notice that the application follows the same order as the explanation of the law. In the explanation of the law, the writer explains Woodruff, West, and then Briggs. The application follows that same order. (§8.4)

McLaughlin can also establish that Dixon’s conduct was as extreme and outrageous as the store manager’s conduct in West. In West, the store manager could foresee that his repeated attacks were likely to cause injury because he had been warned about the wife’s poor health. Similarly, here, McLaughlin told Dixon in an e-mail that, as a result of her second posting, he was being harassed, that he could not sleep or eat, and that he worried he would lose an important client. Nevertheless, she kept her statement posted publicly on the Internet and she added the final posting describing McLaughlin as a “monster.” Assuming that her postings were as unwarranted as the store manager’s attack in West, a jury could also find that Dixon’s conduct was extreme and outrageous because she persisted despite knowing the harm her statements were causing.

In this counter-analysis (§ 8.3), the writer explains what Dixon could argue, the legal basis for that argument, and why that argument will, ultimately, not prevent McLaughlin from proceeding to trial.

Notice that the writer explained Briggs, the basis for the counter-analysis, when he explained the other case law. When possible to do so, your reader will find it helpful if you explain at one time all the law relevant to a single element. (§ 8.3)

Dixon may, however, argue that her postings were warranted. Dixon may argue that she acted out of a desire to warn the public about a dangerous man. She will likely rely on Briggs to argue that simply because her postings were unflattering does not mean that a jury could find they were extreme and outrageous. Rather, she will argue that her postings are an “honest, sincere” effort to describe a person and, therefore, they are insufficient to establish extreme and outrageous conduct. If all the evidence shows that her postings were warranted, a court might hold, as a matter of law, that the postings were an honest, sincere effort to describe a person, as it did in Briggs.

All the evidence, however, does not show that her postings were warranted. McLaughlin would testify that he never made any advances on Dixon or the sister, that he was never physically intimate with either, and that he never cheated on his ex-wife. McLaughlin admits that he was once late in paying his taxes and his child support; however, he states that he has now paid both in full. Given McLaughlin’s testimony, a court is unlikely to hold, as a matter of law, that the postings were an honest, sincere effort to describe a person, but rather allow a jury to make that decision. Here, sufficient evidence exists for a jury to conclude that her conduct was extreme and outrageous.

#### **B. Dixon attacked McLaughlin with the intent to cause harm.**

In addition to establishing extreme and outrageous conduct, Dixon’s second and third postings will likely establish she intended to cause harm. A defendant intends to cause harm if she acts “with the intention of causing emotional distress” or if she acts with “reckless indifference to the likelihood that emotional distress may result.” Briggs, 327 S.E.2d at 312 (citing Restatements (Second) of Torts §46 cmt. i (1965)). Frequently, a court will rely on the same evidence to determine intent as it did to assess whether the conduct could be extreme and outrageous. See West, 365 S.E.2d at 626; Woodruff, 307 S.E.2d at 178. For example, the court in West referred back to the store manager’s “unrelenting attack, in the face of explanation” and warnings about the wife’s weak health to establish recklessness. West, 365 S.E.2d at 626; see also Woodruff, 307 S.E.2d at 178 (citing the same “calculated, persistent plan” as the evidence supporting each element of the claim).

In explaining that “[f]requently courts will rely on the same evidence to determine intent” the attorney is making an implicit theme explicit. No court had previously stated that fact, but it is a trend that the writer saw as he reviewed the case law. By making explicit what would otherwise remain obscured, the writer adds value for his client and the attorneys with whom he is working. (§7.1)

In this second element, the writer does not have a parameter of the rule, but uses one case, West, to establish a threshold of behavior. (§ 8.2)

Similarly, the same evidence that establishes Dixon's extreme and outrageous conduct also establishes her recklessness. As noted above, McLaughlin warned Dixon of the harm her postings had already caused and the harm they were likely to cause in the future. Nevertheless, like the store manager in West, Dixon continued with her accusations. Assuming that her allegations are without merit, a court is likely to find that her baseless, "unrelenting attack," especially in the face of warnings about the harm she was causing, is sufficient for a jury to find that she acted with reckless indifference to the likelihood she would cause McLaughlin emotional distress.

Notice how the writer re-integrates the language from the West case illustration so that the reader can see how the prior case law supports his analysis. (§ 8.2)

### **C. Dixon's attacks caused McLaughlin severe emotional distress requiring extensive medical treatment.**

McLaughlin will be able to prove that Dixon's postings caused him to suffer severe emotional distress. Severe emotional distress is "any emotional or mental disorder ... or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." Waddle v. Sparks, 414 S.E.2d 22, 27 (N.C. 1992) (adopting the standard used for the tort of negligent infliction of emotional distress set out in Johnson v. Ruark OBGIN Assoc., 395 S.E.2d 85, 97 (N.C. 1990)). A plaintiff does not have to show physical injury. Dickens, 276 S.E.2d at 335-36. Claims of severe emotional distress may, however, be challenged for lack of medical documentation showing treatment for conditions related to emotional distress. Waddle, 414 S.E.2d at 28.

This explanation of the law does not include any case illustration because the writer believed that the rule was sufficiently clear without additional case law. (§ 7.2)

Accordingly, the application below is rule-based reasoning (§ 8.1) rather than analogical reasoning (§ 8.2).

In the present case, McLaughlin can provide the necessary medical documentation to show severe emotional distress. He is receiving daily therapy and taking anti-depressant medication prescribed by his doctor. Copies of his medical bills (included in his file) show that he has amassed medical costs totaling almost five thousand dollars.

No counter-analysis is needed because the element is easily established: McLaughlin can document his emotional distress and he can show a connection between Dixon's Internet postings and his distress. (§ 8.3)

He can also establish that Dixon's postings caused his emotional distress. His insomnia and loss of appetite began the evening after the second posting, the same evening a brick was thrown through McLaughlin's window. He began seeing a psychiatrist, within two weeks of the third posting. Before Dixon's postings, he had never required this type of treatment. His record of medical treatment following the postings should be sufficient for a jury to find that he suffered severe emotional distress because of Dixon's postings.

### **Conclusion**

Because McLaughlin can establish all three elements of the tort of intentional infliction of emotional distress, McLaughlin can bring a successful claim against Dixon.

\* The fact pattern used in Appendices B and C is based on a fact pattern obtained from the Legal Writing Institute's Idea Bank. The original author of the problem is unknown. The samples presented were based in part on memoranda by various students, but they have been significantly revised to highlight writing techniques that tend to make legal memoranda more or less effective.



## Appendix C

### Less Effective Memo: Intentional Infliction of Emotional Distress

#### MEMORANDUM

The memorandum heading looks less professional because the entries are not aligned: The “C” in “Carla” should be directly above the “J” in “Jane.”

To: Carla Izaguirre

From: Jane Malscrit

Date: January 10, 2013

Re: McLaughlin claim for intentional infliction of emotional distress; Client matter 2275-09924

This Question Presented is less effective because it does not identify the governing rule and it lists few key facts. Thus, the Question Presented fails to give a precise overview of the issue. (Ch. 13)

#### Question Presented

Under North Carolina’s common law, does a businessman recover from a former relative who posted derogatory information about him causing him loss of a business client and emotional disturbance?

This Brief Answer is less effective because it does not explain the elements that need to be satisfied or explain why the elements are satisfied. (Ch. 13)

#### Brief Answer

Yes. Our client will probably be able to prove intentional infliction of emotional distress because it is likely that the defendant’s conduct was extreme and outrageous, that the defendant intended to cause, and did cause, the plaintiff severe emotional distress.

The writer jumps into detailed facts before giving the reader context. The Statement of Facts would be more effective if it opened by introducing the parties and the crux of their problem. (Ch. 14)

Notice that irrelevant details, such as the name of McLaughlin’s firm and the kinds of clients he works with, will be distracting. The detail will make the reader believe the information is important when, in fact, it is not.

#### Facts

McLaughlin is the co-owner of a marketing firm, I-Tech Marketing, that works with clients in the nano-technology and pharmaceutical industries. Dixon maintains a website dedicated to sharing her sexual exploits. She generally uses pseudonyms when referring to family on her site. In postings that discussed the family’s negative response to her lifestyle, Dixon mentioned McLaughlin and his son by name. McLaughlin sent an e-mail to Dixon that requested she remove references to his son from her site. Dixon complied with the request; however, she posted a second entry on the site accusing McLaughlin of making sexual advances on a variety of people and failing to pay back taxes and child support. The posting also included McLaughlin’s home address and e-mail address. Dixon urged those reading the posting to “let him know how you feel about what he’s done.”

The postings should be described in more detail because those facts are critical to the analysis below.

On the morning after Dixon posted the second entry, McLaughlin began receiving harassing e-mails and phone calls expressing outrage at his purported actions. That night, a brick with a death threat attached was thrown through his living room window, and McLaughlin began suffering from insomnia and loss of appetite. He also missed work and feared losing the client who was aware of the site. McLaughlin then sent another e-mail to Dixon asking her to please remove the postings. He described the harassment and his insomnia. He also mentioned he risked losing a client because of her postings. In response, Dixon posted a third entry accusing McLaughlin of attempting to bribe her and characterizing him as “a potentially violent ... and mentally unstable monster.” After this third posting, he continued to receive harassing phone

calls and e-mails. He calculates he has received over one hundred such e-mails and phone calls. He also lost the major business account. Two weeks after the final posting, McLaughlin began seeing a psychiatrist. McLaughlin now requires daily therapy and anti-depressant medications. He has amassed almost five thousand dollars in doctor's bills and medication costs. (Copies of his medical bills are included in his file.) He reports that his insomnia and loss of appetite persist, and he is embarrassed by his ongoing need for psychiatric treatment. McLaughlin tells us that the postings have little factual basis.

Notice how the lack of paragraphs makes it more difficult to read the Statement of Facts.

The last paragraph ends abruptly, without giving the procedural posture or explaining what the client would like the attorneys to do. (Ch. 14)

### **Discussion**

The roadmap paragraph is okay. It would be more effective if the initial conclusion identified what claim will be successful. (Ch. 12)

The writer's explanation that the first element will be more difficult to establish is helpful: it helps the reader understand the relative strengths and weaknesses of the client's case.

Our client's claim will likely be successful. North Carolina follows common law guidelines to determine the presence of intentional infliction of emotional distress. The three elements necessary to establish such a claim are (1) extreme and outrageous conduct, (2) that is intended to cause severe emotional distress, and (3) does cause severe emotional distress. Woodruff v. Miller, 307 S.E.2d 176, 178 (N.C. 1983) (citing Dickens v. Puryear, 276 S.E.2d 325, 335 (N.C. 1981)). In the present case, the first element, that the conduct was extreme and outrageous, will be most difficult to prove. However, our client can easily establish the second and third elements.

The point heading does not "work" because it does not tell the conclusion or the reason for the conclusion.

In addition, Roman numerals are reserved for main legal questions. An element is a sub-part of a dispositive issue, it should be designated with a capital letter, such as "A," "B," or "C." (Ch. 12)

The writer explains the rules through two long quotations. The long quotations create problems because they include more information than the reader needs; have a different voice than the writer's; and leave the impression that the writer doesn't understand the law, but merely copied rules onto the page. To be more effective, quotations should be used sparingly, with only key language quoted. (§7.1)

## **I. Extreme and Outrageous Conduct.**

A jury could find Dixon's conduct to be extreme and outrageous. "As to what is sufficiently outrageous to give rise to liability, the comments in the Restatement are instructive. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Briggs v. Rosenthal, 327 S.E.2d 308, 311 (N.C. Ct. App. 1985) (citing Restatement (Second) of Torts §46 cmt. h (1965)). "The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime, plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt." Id. at 311.

A court will consider many factors, including the following: the offensiveness of the conduct, the persistence of the conduct, the defendant's purpose in acting, and the foreseeability of injury to the plaintiff. West v. King's Dept. Store, Inc., 365 S.E.2d 621, 625 (offensiveness, persistence and foreseeability); Briggs v. Rosenthal, 327 S.E.2d 308 (N.C. App. 1985) (offensiveness, purpose, and foreseeability); Woodruff v. Miller, at 178 (offensiveness, purpose, and persistence).

Key components of the citations are missing in each cite—the parenthetical with court and date, the pinpoint cite, and the volume and reporter.

The case illustration lacks a hook. As a result, the reader will have to guess at the point that the writer wants to make in providing this case illustration. (§7.2)

In Woodruff, the plaintiff was the superintendent of the local school system. Woodruff, at 177. The defendant, after losing two lawsuits to the superintendent, posted copies of the superintendent's thirty-year old arrest record on the "Wanted" board at the local post office and on bulletin boards at the local high school. Id. The defendant also showed the "Wanted" poster to at least one prominent citizen in the community. Id. Thirty-years ago, the superintendent had participated in a college prank and been arrested. Id. At the time of the posting, the plaintiff's

record was not being considered or reviewed by any person or agency for any reason or purpose. Id. No one but the defendant was interested in the plaintiff's background. Id. A jury found that the defendant had intentionally inflicted emotional distress on the superintendent. Id.

These facts showing that no one but the defendant was interested in the plaintiff's record are never relied on below. The writer needs to consider whether these facts are excess here or should be put to use in the application.

Again, this case illustration lacks a hook. As a result, the reader will struggle to see the point the case illustrates and how this case relates to the prior case.

Also, compare the level of detail used to describe West here and the level of detail in the memo in [Appendix B](#). Which illustration will help the reader better visualize why the court held the store manager's conduct was extreme and outrageous?

In West, a store manager accused plaintiffs, a husband and wife, of stealing merchandise. Id. at 622-23. He publicly accused the husband and wife even though they proved that they had purchased the merchandise. Id. at 623. The store manager also knew that the wife had recently been hospitalized. Id. The court held that the "unrelenting attack, in the face of explanation," was sufficient to establish extreme and outrageous conduct. Id. at 625. In reaching its conclusion, the court particularly noted that the store manager continued his attacks even after being warned about the wife's delicate health. Id. at 625.

In addition to the problems mentioned above, the writer has forgotten to provide citations.

By contrast, in Briggs, the plaintiffs were parents whose son had recently died. They sued the defendants, a journalist and a newspaper publisher, after the newspaper published an article about their recently deceased son. The article described the son's drinking and anti-social behavior but, also, described positive aspects about the son. The Briggs court found that the article, although offensive to the parents, was "honest, sincere, and sensitive."

The application begins here. The sentence introducing the application is less effective because it does not indicate the conclusion the application will reach.

Notice that the writer applies the law in a different order than it was explained. Because an attorney assumes the explanation of the law sets out a clearly marked path for stepping through an analysis, an attorney will be surprised if the application follows a different path. Thus, your application should follow the same order as your explanation. If your application varies the path, warn your reader. (§8.4)

The comparison to Woodruff has two significant problems. First, the comparison fails to remind the reader of the key facts in Woodruff. Without those facts, the reader cannot see the similarities that the writer does. Second, the writer does not explain the legal significance of the comparison.

McLaughlin's case is comparable to West. In West, the store manager could foresee that his repeated attacks were likely to cause injury because he had been warned about the wife's poor health. Similarly, here, McLaughlin told Dixon in an e-mail that, as a result of her second posting, he was being harassed, that he could not sleep or eat, and that he worried he would lose an important client. Nevertheless, she kept her statement posted publicly on the Internet, and she added the final posting describing McLaughlin as a "monster." Assuming that her postings were as unwarranted as the store manager's attack in West, a jury could also find that Dixon's conduct was extreme and outrageous because she persisted despite knowing the harm her statements were causing.

McLaughlin can also argue that his case is like Woodruff. To begin, Dixon's accusations were as derogatory as those in Woodruff because she accused McLaughlin of sexual misdeeds, adultery, tax evasion, failure to pay child support, and being a "potentially violent" and "mentally unstable monster." Moreover, like the defendant in Woodruff, Dixon made her attacks repeatedly available to the public by posting them all to the Internet and refusing to remove them. Finally, if they are in fact baseless, her accusations seem to have "no other purpose but ... spiteful satisfaction."

This counter-analysis is less effective because it does not explain Dixon's counter-argument before explaining why the counter-argument is weak. A counter-argument should be described as fully as a primary argument so the reader can assess its strengths and weaknesses. (§8.3)

Notice, also, that the writer relies on facts that were not included in the Statement of Facts. This will surprise an attorney and make the writer seem less organized.

Dixon may, however, argue that her postings were warranted. If all the evidence shows that her postings were warranted, a court might hold, as a matter of law, that the postings were an honest, sincere effort to describe a person, as it did in Briggs. McLaughlin would testify that he never made any advances on Dixon or the sister, that he was never physically intimate with either, and that he never cheated on his ex-wife. McLaughlin admits that he was once late in paying his taxes and his child support; however, he states that he has now paid both in full. Given McLaughlin's testimony, the evidence is sufficient for a jury to conclude that Dixon's conduct was extreme and outrageous.

## II. Intent to Cause Harm.

McLaughlin can establish that Dixon intended to cause him harm. A defendant intends to cause harm if he intends to cause emotional distress or acts with reckless indifference to the likelihood that he will cause emotional distress. Briggs, 327 S.E.2d at 312 (citing Restatements (Second) of Torts §46 cmt. i (1965)).

Here, the failure to give a case illustration is a problem. Without a case illustration, the reader cannot visualize what intent to cause harm or recklessness looks like.

Because the writer failed to provide a case illustration in her explanation of the law, her analysis here seems unsupported by the law.

The same evidence that establishes Dixon's extreme and outrageous conduct also establishes her recklessness or intent to cause harm. As noted above, McLaughlin warned Dixon of the harm her postings had already caused and the harm they were likely to cause in the future. Nevertheless, Dixon continued with her accusations. A court is likely to find that her baseless, "unrelenting attack," especially in the face of warnings about the harm she was causing, is sufficient for a jury to find intentional infliction of emotional distress.

The conclusion should be about the element being examined: intent. A conclusion about the overall claim of intentional infliction of emotional distress is too broad.

## III. Severe Emotional Distress.

The next issue is whether Dixon's postings caused McLaughlin to suffer severe emotional distress. Severe emotional distress is "any emotional or mental disorder ... or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so." Waddle v. Sparks, 414 S.E.2d 22, 27 (N.C. 1992) (adopting the standard used for the tort of negligent infliction of emotional distress set out in Johnson v. Ruark OBGIN Assoc., 395 S.E.2d 85, 97 (N.C. 1990)). McLaughlin does not have to show any physical injuries. Dickens, 276 S.E.2d at 335-36. However, if McLaughlin fails to provide medical documentation showing treatment for conditions related to emotional distress, his claim of emotional distress may be challenged. Waddle, 414 S.E.2d at 28.

Introducing the client in the explanation of the law will confuse the reader. Moreover, including McLaughlin's name makes the citations to the last two sentences inaccurate: Neither the Dickens court nor the Waddle court ever mentioned McLaughlin. (Ch. 6)

The writer has omitted some of the facts that would show that Dixon caused severe emotional distress, such as his insomnia and loss of appetite. Perhaps the writer believes the relevant facts are obvious or known to the senior attorney; however, this memo acts as a record of all the facts that are relevant to each element, and so the writer should do the work of gathering all the relevant evidence in one place.

In the present case, McLaughlin can provide the necessary medical documentation to show severe emotional distress. He can also establish that Dixon's postings caused his emotional distress. He began seeing a psychiatrist within two weeks of the third posting, and he had never before required this type of treatment. This record of medical treatment following the postings should be sufficient for a jury to find that he suffered severe emotional distress because of Dixon's postings.

The conclusion to the client's overarching question should be in the first sentence of the paragraph where it is easy to find.

## Conclusion

McLaughlin can establish that Dixon caused his severe emotional distress, that she acted with reckless indifference as to whether her conduct would cause severe emotional distress, and that her conduct was extreme and outrageous. Therefore, McLaughlin can bring a successful claim against Dixon.

## Glossary

**ALWD Manual.** The common name for the *ALWD Citation Manual: A Professional System of Citation*, which sets out a system for citing authority in legal documents.

**Analogical Reasoning.** Reasoning by which an attorney argues that a client's case is similar enough to a previous case that the outcome in the previous case should control the present case or that a client's case is different enough from a previous case that the outcome of the previous case does not control.

**Analysis.** The process of evaluating the law on a particular topic.

**Background facts.** Facts that provide context for understanding the underlying problem in a legal conflict, but that are not necessary to resolve the legal issue.

**Balancing test.** The evaluation of a governing rule composed of factors.

**Bluebook.** The common name for *The Bluebook: A Uniform System of Citation*, which sets out a system for citing authority in legal documents.

**Brief Answer.** In a memorandum of law, the Brief Answer provides the bottom-line answer to each Question Presented discussed.

**Caption.** The part of a court document that identifies the parties, the court in which the case is being heard, the docket number, and the title of the document.

**Case illustration.** An explanation of how a rule was applied in a prior case. An illustration will usually include a hook, trigger facts, the court's holding, and the court's reasoning.

**Case law.** Any judicial decision rendered by a court, whether construing a statute or common law. (Compare to **common law**.)

**Citation.** A reference to a specific legal authority or source that gives all identifying information about that source.

**Code.** A compilation of statutes, legislative acts, regulations, or ordinances, usually arranged topically.

**Common law.** A subset of case law referring to decisions created solely by the judicial branch without reference to statute, regulation, or any other law from the legislative branch. (Compare to **case law**.)

**Critical reading.** A reading process in which one actively engages information and questions it rather than passively accepting every word as written.

**Dicta.** Assertions or statements in a judicial opinion on points that are not necessary to address an issue presented by a party.

**Element.** A requirement that must be met before a governing standard can be established.

**Elemental analysis.** The analysis of a governing rule composed of elements.

**Emotional facts.** Facts not necessary to resolve a legal issue but that help the reader understand what motivated the parties to act or react in a particular way.

**Enacted law.** Law that has been passed and put into effect by a legislature.

**Executive order.** A directive from the executive branch that implements or interprets a statute, a constitutional provision, or a treaty.

**Factor.** A condition that a court considers when determining whether a governing standard is met.

**Finding.** A determination of fact a court makes in a judicial opinion.

**Governing rule.** The standard for a particular legal issue which tells people what they must or can do, what they must not or should not do, or what they are entitled to do under certain conditions. The governing rule can come from a statute or common law or from a combination of both sources.

**Headnote.** A one-paragraph or one-sentence summary for each point of law presented in a case, found at the beginning of a judicial opinion. Because headnotes are publishing tools and not legal authority, they should not be cited.

**Holding.** The court's answer to a particular legal question in a case that includes both the controlling rule of law and the specific facts of the case pertinent to the legal question.

**Hook.** The first sentence of a case illustration that states the legal principle that the illustration will clarify and prove to be true.

**Jurisdiction.** The area of authority over which a governing body has authority.

**Legal argument.** An analysis of a legal question that includes a conclusion or issue statement, an explanation of the law relevant to a client's problem, an application of that law to the client's facts, and a conclusion.

**Legally significant facts.** Facts in a client's case that a court will likely rely on to make its legal decision.

**Legislative history.** The record that develops as an idea for a law evolves into a statute.

**Mandatory authority.** Legal authority from a governing body within a jurisdiction that a court must follow. Mandatory authority is always primary authority.

**Memorandum.** A document used to communicate a legal analysis.

**Mini-roadmap.** An introductory section to a legal argument that sets out the governing rule for one element or factor, tells the reader the parts of that rule that will be discussed, the order the discussion will follow, and the conclusion for that discussion.

**Objective analysis.** A neutral assessment of a legal problem that overtly discusses both the strengths and the weaknesses of a client's legal position and predicts the most likely outcome. (See also **predictive analysis**.)

**Persuasive authority.** Non-binding law or commentary that a court may consider when deciding a case. Persuasive authority may be primary or secondary authority.

**Point heading.** A statement in a legal discussion that separates or introduces individual legal arguments. A point heading can include all or a combination of the following parts: the ultimate conclusion for a legal issue, the rule of law governing the issue, and the key facts supporting the conclusion. Point headings should be a complete sentence.

**Policy.** The underlying purpose or reason for a law.

**Precedent.** A prior judicial decision that establishes a basis for a similar case or similar question of law arising later. Binding precedent must be followed; persuasive precedent need not be.<sup>1</sup>

**Predictive analysis.** A neutral assessment of a legal problem that overtly discusses both the strengths and the weaknesses of a client's legal position and predicts the most likely outcome. (See also **objective analysis**.)

**Primary authority.** Any law created and published by a governing entity within a jurisdiction.

**Prong test.** An evaluation of whether a standard is met by using a multi-part inquiry. A prong test can be an element analysis, a balancing test, or a series of questions.

**Question Presented.** In a memorandum of law, the Question Presented sets out each dispositive legal question the discussion will analyze and answer.

**Red flag words.** Words that proscribe action, inaction, limitation, causation, entitlement, or consequence. (See also **special operative words**.)

**Regulation.** A law created by an executive branch agency that implements or expounds on a statute.

**Reporters.** A series of books that collects and publishes cases in chronological order.

**Roadmap.** An introduction to a legal analysis that tells the reader the legal question being asked, the governing rule for the question, the applicable parts of the question the analysis will discuss, the order in which those parts will be presented, and the ultimate conclusion to that legal question.

**Roadsign.** A signal to the reader alerting attention to an important part of the analysis.

**Rule of the case.** A point of law a judicial opinion will represent to future cases.

**Rule-based reasoning.** Direct application of a rule to the facts of a client's case to predict an outcome.

**Secondary authority.** Commentary about the law from sources such as legal encyclopedias, law review articles, or treatises, which explain how the law works. Secondary authority can be persuasive authority, but not binding.

**Special operative words.** Words that proscribe action, inaction, limitation, causation, entitlement, or consequence. (See also **red flag words**.)

**Stare decisis.** Part of the phrase, *stare decisis et quieta non movere*, which means "to stand by things decided and not disturb settled points." Stare decisis is a principle in American jurisprudence that requires a court to follow its prior decisions when the prior decision addresses the same issue.

**Statute.** A law enacted by the legislature. (See also **enacted law**.)

**Synopsis.** A brief summary of a case explaining the most basic issue, the underlying facts, and the dispositions by the lower courts and the current court. It is found right after the caption of a judicial opinion. Because a synopsis is a publishing tool, not legal authority, do not cite it.

**Synthesis.** The process of combining or blending parts to create a whole.

**Test.** An examination to determine whether a standard set out in a governing rule is met.

**Topic sentence.** The first sentence of any paragraph that clearly identifies the point that paragraph will prove.

**Totality of the circumstances test.** An evaluation of all relevant facts, together, to determine whether the standard set by a governing rule is met.

**Trigger facts.** The facts of a prior precedential case that triggered the court's decision on an issue. Trigger facts can also be called "critical" or "key" facts.

<sup>1</sup> Bryan A. Garner, *A Dictionary of Modern Legal Usage* 680-81 (2d ed. 1995).

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